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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 28

THE WASHINGTON TERMINAL COMPANY, PETITIONER

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 124 F. (2d) 235, and is printed in the record at R. 331–381. The district court rendered no opinion.

STATUTE INVOLVED

The statute primarily involved is the Railway Labor Act as amended June 21, 1934 (c. 691, 48 Stat. 1185, 45 U. S. C., Secs. 151–163), and particularly Section 3 thereof, which creates and defines the powers of the National Railroad Adjustment Board. The entire Act is printed at

pp. 74–87 of the Appendix to a compilation of material on the Adjustment Board entitled "Inquiry of the Attorney General's Committee on Administrative Procedure relating to the National Railroad Adjustment Board, and Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888–1940" (hereinafter referred to as *Compilation*) copies of which have been distributed to the Court.[1]

The most important provisions are paragraphs (i), (j), (m), (o), (p), and (q) of Section 3, First of the Act. These paragraphs read as follows:

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval

[1] This volume is a compilation of most of the pertinent documentary material relating to the National Railroad Adjustment Board. It contains in full the reports of and proceedings before the Attorney General's Committee on Administrative Procedure dealing with the Adjustment Board, and reprints the executive orders, collective labor agreements, and statutes disclosing the history of the Adjustment Board and also the leading speeches and articles describing its operation. This publication was compiled by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, New York City. Most of the documents hereinafter referred to are printed in the Appendix to the volume (the *pink* pages).

of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award in-

cludes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at

law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

STATEMENT AND QUESTIONS PRESENTED

Respondents, employees of petitioner, were engaged in a dispute with petitioner as to the interpretation to be given the seniority provisions of the collective agreement governing the work performed by the respondents. After the parties had failed to settle the dispute themselves, respondents submitted their claims to the First Division of the National Railroad Adjustment Board, which, on October 24, 1938, ruled in respondents' favor (R. 9–10). On December 29, 1938, petitioner filed this suit for a declaratory judgment, praying that the agreement be interpreted in accordance with petitioner's original contentions and that the award and order of the Adjustment Board be declared "invalid and of no legal force and effect" (R. 13–14).

The District Court dismissed the complaint, holding that there was no actual controversy between the parties, and that there was a specific

remedy provided by statute for this type of case (R. 326, 55). The Court of Appeals for the District of Columbia affirmed, on the ground that at least during the first two years after the Adjustment Board's award the procedure prescribed in Section 3, First (p) of the Railway Labor Act was exclusive (R. 331–381). Before the entry of the opinion of the Court of Appeals, the two-year period expired. This Court granted certiorari (R. 383).

After argument by the parties, this Court entered the following order:

> This cause is restored to the docket for reargument. On the reargument counsel are requested to include in their briefs and oral argument a discussion of the following questions:
>
> 1. Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts, either before or after submission of the dispute to the Board;
>
> 2. Whether the Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award;
>
> 3. The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts;

4. The effect of the words "final and conclusive" in Section 3 First (m) upon the right to resort to the courts and upon the scope of judicial review, (a) during the two-year period, and (b) after expiration of the two-year period.

The Solicitor General is requested to file a brief, and, if he so desires, to participate in the oral argument.

This brief is filed pursuant to the above request. It will discuss the four questions listed in the Court's order.

SUMMARY OF CONCLUSIONS

1. A party is not precluded by the adjustment provisions of the Railway Labor Act from resorting to the courts instead of submitting a dispute to the Adjustment Board. Once the machinery of the Act has been invoked, however, extra-statutory legal proceedings are no longer available to the parties.

2. The Board may make an award although one party does not appear, and such an award has the same effect as any other.

3. The expiration of the two-year period specified in Section 3, First (q) for seeking enforcement of orders of the Adjustment Board does not enlarge the right of either party to resort to the courts.

4. The provision in Section 3, First (m) that non-money awards shall be "final and binding" is an indication that Congress intended such awards

to be treated as conclusive except as otherwise specified in the Act or required by the Constitution. This would mean that where the statutory remedies are legally adequate, no other proceedings can be brought, and that in any extra-statutory suits which might be brought, the Board's awards would be judicially reviewable to the minimum extent required by the Constitution. In proceedings under Section 3, First (p), the Board's awards would be *prima facie* evidence of the facts stated.

These conclusions are based upon what we conceive to have been the intention of the Congress which passed the Act in 1934. That Congress, we believe, assumed that paragraph (p) would not only provide the carrier with an adequate remedy in theory, but also that the paragraph would be used by the employees. The latter has not been the fact. Nevertheless, despite the effect of the employees' unforeseen refusal to avail themselves of the remedy upon its practical adequacy, we do not feel free to urge that, because of the manner in which the Act has operated, it should be construed in a way not intended by the Congress.

ARGUMENT

INTRODUCTION

The issues presented by this case arise because of the effort of Congress to strengthen a bipartisan system of adjustment, dependent for its

existence and force upon the agreement of the parties, by changing it into a compulsory system finding its roots in mandatory statutory provisions. Labor and management differ as to whether this transformation affected the basic nature of the system and the manner in which it was designed to operate. A consequence of their conflicting positions has been to impair the effective functioning of at least the First Division of the National Railroad Adjustment Board.

The difficult questions which now confront the Court result, in part, from the failure of Congress to recognize or be aware of the possible implications of this change. This is reflected in the novel and, in so far as involved here, apparently internally inconsistent language of the Act. In these circumstances, and in the absence of an express declaration of any sort, legislative intention is difficult to ascertain.

THE FIRST QUESTION

WHETHER EITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE BY THE COURTS, EITHER BEFORE OR AFTER SUBMISSION OF THE DISPUTE TO THE BOARD

The primary issue presented in this case is whether a carrier may bring an action for a declaratory judgment seeking an interpretation of a railway labor agreement after the same question has been presented to, and decided by, the National Railroad Adjustment Board. The Court has also requested discussion of the separate but related

question as to whether the Adjustment Board's jurisdiction is exclusive in the first instance.

No provision of the Railway Labor Act expressly answers either of the questions. Nor is there definite manifestation of congressional intention in the immediate legislative history of the Act. We are thus faced with the task of seeking the meaning of the Act in relation to a problem which probably did not occur to the legislative body and with respect to which it appears to have had no "consciousness of intention" whatsoever. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 389. The problem must be resolved in the light of the purposes of the statute, and particularly of the provisions relating to the Adjustment Board. An examination of the historical background of those provisions should aid in determining the construction most likely to achieve the statutory objectives.

A. THE HISTORICAL BACKGROUND [18]

1. *The Period Preceding the Present Act*

The present Board is the culmination of a long period of practice and experimentation in devising means of settling railway labor disputes. The first predecessor of the Adjustment Board was the

[18] The background and legislative history of the "final and binding" clause in Section 3, First (m) are set forth separately in our discussion of the Court's Fourth Question, *infra*, pp. 71–81. That material, which develops the relationship between adjustment under the Railway Labor Act and arbitration, also has a bearing upon the answer to the First Question.

"Commission of Eight" created on March 19, 1917, by agreement of the railroads and the four train-service Brotherhoods, to interpret an award of the Committee of the Council of National Defense settling the eight-hour day controversy.[2] This commission was composed of four representatives of the Brotherhoods and four of the carriers.[3]

Shortly after the Government took over the railroads during that war, the Director General of Railroads, by order, established Railway Board of Adjustment No. 1, which was in substance and form a continuation of the Commission of Eight for train service employees.[4] The order, which made effective a "memorandum of an understanding," previously reached between the Brotherhoods and the "directors for the railroads under government control," provided that "all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government *shall* be dis-

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[2] See *Compilation*, pp. 403–404, Appendix, pp. 18–19; Wolf, *The Railroad Labor Board*, pp. 50–57. The award was expressly made to become effective whether or not the Adamson Act was held constitutional. Although the settlement was obviously agreed upon before the decision of this Court in *Wilson* v. *New*, 243 U. S. 332, it was signed on March 19, 1917, the same day that the decision was rendered.

[3] *Compilation* and *Wolf, loc. cit. supra.*

[4] See *Wolf, supra*, pp. 50 *et seq.; Compilation*, Appendix, pp. 19–22.

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posed of in" [italics supplied] the manner described.[5] Deadlocked cases were referable to the Director General; "but practically every case" was amicably settled by a majority vote of the Board.[6] During succeeding months two similar boards were established for the shopcrafts and for other national labor organizations.[7]

This machinery was recognized as applicable only to the members of the major railway labor organizations signatory to the understanding.[8] By order of the Director General the cases of "employees not represented by Railway Boards of Adjustment" were to be handled by the individual or his representative in the same manner up to

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[5] The Board consisted of an equal number of representatives of the carriers and the labor organizations. Section 10 of the memorandum, in language similar to that in the present Act, provided that "Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes * * * covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or someone officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer" then the matter shall be jointly submitted to the board of adjustment. In the proceedings before the Board the employees were to be represented by the person designated by the chief executive officer of the organization concerned. *Ibid.*

[6] See *ibid; Report of the Director General for the Fourteen Months Ending March 1, 1920*, p. 15.

[7] *Compilation*, Appendix, pp. 23–30; Wolf, *supra*.

[8] Wolf, *supra*, pp. 52–53.

the chief operating officer of the carrier, and then if not settled, submitted to the Division of Labor of the Railroad Administration.[9]

These orders became inoperative after the carriers were returned to private ownership. Railway labor relations were subsequently governed by Title III of the Transportation Act, 1920 (c. 91, 41 Stat. 456). Although it had been proposed that adjustment boards be made compulsory, Section 302 of the 1920 Act provided only that—

> Railroad Boards of Labor Adjustment *may* be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.[10] [Italics supplied.]

Such adjustment boards were to hear cases submitted by the carriers or labor organizations, or "upon the written petition signed by not less than 100 unorganized employees" (Section 303). If no adjustment board was established, or if an adjustment board failed to reach an agreement, the dispute was to be submitted to the Railroad Labor Board (Section 307).[11]

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[9] *Compilation*, Appendix, pp. 30–32.

[10] *Compilation*, Appendix, p. 33; Wolf, *supra*, pp. 91, 267.

[11] This Board was composed of three representatives of the public, three of management, and three of labor. Its functions are described in *Pennsylvania Railroad Company* v. *Railroad Labor Board*, 261 U. S. 72; *Pennsylvania Railroad System and Allied Lines Federation* v. *Pennsylvania Railroad Company*, 267 U. S. 203; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

Although the Act was passed in the belief that adjustment boards would be established, the carriers and the labor organizations were not able to agree upon whether national or system boards should be created.[12] Accordingly, no general scheme of adjustment boards was established. One result of this was that the Railroad Labor Board was swamped with a vast number of minor cases and was unable to devote adequate time to the larger issues with which it was expected primarily to deal.[13]

Three regional adjustment boards, however, were created, by agreement between the four train-service brotherhoods and many of the carriers. These agreements were substantially similar to those entered into during the War; they provided that disputes "shall be" disposed of in the manner provided. Unsettled cases were to be certified to the Railroad Labor Board.[14]

In 1926, after the break-down, for many reasons,[15] of the machinery established in Title III

[12] Wolf, *supra*, pp. 267–273. As in 1934, the employees sought a national board and the carriers system boards.

[13] *Ibid.*

[14] Wolf, *supra*, pp. 273–276; *Compilation*, Appendix, pp. 39–53. The agreements conformed to the statute in that after submission to the chief operating officer of the carrier, disputes could be filed with the Board either by the chief of the labor organization or by petition of 100 unorganized employees.

[15] See Wolf, *supra*, pp. 358 et seq.; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 563; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 542.

of the Transportation Act, the Railway Labor Act was enacted in its place (44 Stat. 577). Section 3 of this statute indicates an intention that the establishment of adjustment boards was mandatory; it provided that—

> * * * Boards of adjustment *shall* be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.[16] [Italics supplied.]
>
> * * * * *

The section went on to state that disputes of the type here in question "shall be handled in the usual manner up to and including the chief operating officer of the carrier * * *; but, failing to reach an adjustment in this manner, that the dispute *shall be referred* to the designated adjustment board by the parties, or by either party * * *" [Italics supplied.] (Section 3, First (c)).

As might have been anticipated, the change from "may" to "shall" in the 1926 Act did not in itself succeed in bringing agreement between

[16] The labor organizations had previously supported the Howell-Barkley Bill which was favorably reported to the Senate in 1924, but which failed to pass. See Senate Report No. 779, 68th Cong., 1st Sess.; Wolf, *supra*, pp. 406–415. This bill provided for national adjustment boards. Presumably the substitution in the 1926 bill of the provision for the establishment of boards by agreement only was a concession to the carriers in order to get them to join with the labor organizations in submitting the latter bill to Congress.

carriers and employees as to the kind of adjustment board to be created. The carriers still insisted on system boards and the Brotherhoods on a national board.[17] The boards previously established for train service employees were continued, however, and a new board created for the southwestern region.[18] In addition, a number of

[17] The situation was picturesquely described by Chairman Winslow, of the Board of Mediation, before the Senate Committee on Interstate Commerce, at the Hearings on the 1934 amendments (Hearings on S. 3266, 73d Cong., 2d Sess., p. 137), as follows:

"The provision in the present act for adjustment boards is in practice about as near a fool provision as anything could possibly be. [Laughter.] I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree? No way has yet been found, where difficulties have come up. But the curious part is that they can work entirely within the provisions of law and never agree, so you never get an adjustment board. Side A, for instance, wants a system board. Side B wants a regional board, to illustrate. And they are both subscribing to that provision of law; they both want boards; they are brokenhearted to think that they can't get them [laughter], but they never will agree on the board. So what good is it? It is utterly impractical and absolutely a mess * * *."

[18] *Compilation*, p. 410, Appendix, pp. 57–61. The new train service agreement was substantially the same as the earlier ones, except that it omitted the provision required by the 1920 Act for submission of cases by unorganized employees (*Ibid.*). The older agreements were modified so as to make unsettled cases referable to the Board of Mediation instead of to the Railroad Labor Board, and so as to indicate that only organizations party to the agreement could submit cases to the Board (*Id.*, at 47, 49, 54, 56).

system boards were created for other classes of employees.

But in many instances the carriers and the employees were unable to reach agreement on whether or not to establish boards of adjustment. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 3. Moreover, the 1926 Act contained no machinery to deal with the cases in which the carrier and labor members of the Boards, who were equal in number, failed to agree. As a consequence, "Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked" (*Ibid.*). The Board of Mediation was flooded with these deadlocked cases, to be handled through mediation in addition to its other duties.[19] The result of the failure of the parties to agree to establish adjustment boards, or of the members of such boards to reach decisions was that "unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment" (*Ibid.*).

[19] See the testimony of Chairman Winslow at the Hearings before the House Committee on Interstate and Foreign Commerce on Railway Labor Act amendments (H. R. 7650), 73d Cong., 2d Sess., p. 72 (hereinafter referred to as "House Hearings"). In 1934 the name of the Board of Mediation, created by the 1926 Railway Labor Act, was changed to "National Mediation Board."

There was substantial agreement as to the need for correcting these conditions. Federal Coordinator of Transportation Eastman, who submitted and explained the bill which became the 1934 Act to the congressional committees, summed up the views of the carriers and the employees on this question as follows (Hearings before Senate Committee on Interstate Commerce, to amend the Railway Labor Act (S. 3266), 73d Cong., 2d Sess., pp. 152–153, hereinafter referred to as "Senate Hearings"):

> * * * Apparently it is agreed by all that the provision in the present act for boards of adjustment has been ineffective; (1) because the establishment of such boards has not been compulsory, and (2) because there has been no way to prevent deadlocks in those which have been set up. The employees want a National Board of Adjustment, divided into four sections, to be created definitely and certainly; and the railroads, as I understand them, are willing to have 16 regional boards of adjustment set up. Both parties are willing to permit system or other local boards of adjustment to be set up by agreement, so long as the arrangement is otherwise within the terms of the act. Both are willing to have neutral members appointed, and by the Mediation Board if necessary, in order to prevent deadlocks.

The Coordinator favored the establishment of a national board, although he conceded that the

plan was experimental, that there was something to the carriers' objection that such a board might "bog down with a multitude of docketed but undecided cases" (*id.*, at p. 18), that the plan depended for its success "very largely upon the wisdom with which it is administered, both by the actual members of the board and also by the parties which stand behind them, namely, the carriers and the labor organizations," (*ibid*) and that either side could "make the experiment fail" (*id.*, at p. 19).

Mr. Eastman advanced as one of the advantages of a national board, as contrasted with regional boards, the desirability of "a more uniform settlement of these disputes"; this he felt would ultimately "tend to reduce very materially the number of disputes which could not be settled locally" (*id.* at 154, 155). In this connection he stated:

> I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would

> be to establish guides which would enable a great many of the issues to be settled at home.[20] * * *
>
> * * * * *
>
> Furthermore, I have the feeling that it is very desirable to have a more uniform settlement of these disputes. These matters that we are now dealing with are grievances. They are not the basic rates of pay or the basic working rules and the interpretation of those rules or grievances which men have, and it doesn't seem to me that it is necessary to have any number of different ways of disposing of those all over the country, and that the national board could soon set certain precedents which would discourage and limit the number of such disputes which would arise, because it would be perfectly clear what the outcome would be if they were preferred to the national board.[21]

Uniformity in applying railway labor agreements is, of course, more likely to be achieved if all disputes must first go to a national board rather than to the numerous state and federal courts. Thus, although Mr. Eastman was speaking only of the advantages of national over regional adjustment boards, his remarks are also pertinent here.

As a result of opposition on the part of the carriers to a national adjustment board, two new

[20] House Hearings, *supra*, p. 48.

[21] Senate Hearings, *supra*, p. 155.

paragraphs, now Section 3, First (w), and 3, Second, had been added to the bill by the time it came before the House Committee. They provided (1) that any division of the adjustment board might establish regional boards, and (2) that any carrier or group of carriers could agree with the representatives of its or their employees to establish system, group, or regional boards, which would take the place of the national board in so far as that carrier or carriers were concerned. Mr. Eastman supported the bill with these amendments, which he thought sufficient to meet the objections raised. This would seem to indicate that the uniformity in decision which might have resulted from the creation of only a single board was regarded as less consequential than the establishment of boards satisfactory to the parties. The important thing, obviously, was to have an adjustment board, whether local, regional, or national, definitely available for all disputes of the type in question.

The bill, substantially in the form submitted by Mr. Eastman (78 Cong. Rec. 12391, 12371), was reported favorably by both legislative committees. The House report (H. Rep. No. 1944, 73d Cong., 2d Sess.), after summarizing the conditions which made the amendment necessary, stated (p. 3):

> This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of

> a national board of adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties. * * * [Italics supplied.]

When the carriers and employees could agree to establish similar regional or system boards, they were to be "exempt from the jurisdiction of this National Board" (*id.*, p. 4). If a board deadlocked on a decision, impartial referees were to be chosen by the board members, or if necessary, by the Mediation Board. The House report[22] concludes (*ibid.*):

> The committee is confident that this bill strengthens the Railway Labor Act, where it is necessary to do so, and feels sure that if the act is amended as proposed in this bill, it will provide effective and adequate machinery to adjust controversies between the carrier managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace.

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[22] The debates on the 1934 Act add little to the committee reports. The only remarks which might seem to bear upon the question is that of Representative Mead, supporting the bill, who stated that "* * * this bill sets up an orderly procedure for the settlement of grievances and disputes that arise upon the railroads of the country. It augments and supplements existing law; * * *" (78 Cong. Rec. 11718). This suggests that preexisting judicial remedies were not to be destroyed. But this statement referred to the Act generally, and may not have had the present problem in mind.

The Act was passed in June 1934 without any change in these provisions (48 Stat. 1185).

2. *The practice of the present Board.*

As has been shown, the present Adjustment Board is an outgrowth of the boards established by agreement of the parties. Under such agreements, disputes were first to be handled on the property of the carrier, and when they were not disposed of satisfactorily at that stage, the members of the boards were to settle the disputes by "adjustment," a process which was probably in part adjudication and in part bargaining. The preliminary stages of negotiations on the property are the same under the Railway Labor Act as under the earlier agreements, and the Board itself is selected by the parties in substantially the same manner as its predecessors. The source of the present Board's powers, however, is not the will of the parties, but the statute. The Act makes provision for referees if the parties deadlock on awards, and thus permits decisions to which the parties have not agreed (Sec. 3, First (l)). It seems to impose certain of the fundamental procedural requirements common to federal administrative bodies. (See Sec. 3, First (j).) And the Board's decisions can be enforced in the courts in the same manner as those of such familiar agencies as the Interstate Commerce Commission (Sec. 3, First (p)).

Whether in this background "the work of the Board should be denominated 'adjustment', as the

Board's name implies, or whether it is adjudication, is a matter of interpretation on which opinions differ widely. The question is not merely the empty one concerning what labels should be attached for convenience, but it is one on which several important problems hinge. In a sense, the Board's work is only an extension of the machinery for settling disputes on the property of the carriers. When the employee and his foreman discuss a grievance of the employee, they are adjusting rather than adjudicating, and the same is true when the representative of the local union considers the case with the local superintendent. The controversy does not take on an adjudicatory character as it goes on up through the hierarchy of railroad and labor representatives. If the controversy is not settled on the property, the question then is presented to still other 'representatives' of the parties, namely, the members of the Adjustment Board. The carrier and labor members differ in their analysis of the work of the divisions." Attorney General's Committee on Administrative Procedure, *Railway Labor,* Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 4–5 (*Compilation,* pp. 230–232). The carrier members have maintained that "the most cursory examination of the nature of the arguments put up to the Board and the grounds of its decisions where these are given, conclusively demonstrates that it regards its function as one of strict legal

interpretation rather than compromise and adjustment" (*ibid*). The labor members, on the other hand, have taken the position that the Board "should operate as a continuation of the conference room method employed upon the various properties where men and management 'talk things through,' argue the meaning of rules, discuss the application in effect under those rules, and finally attempt to reach an equitable 'adjustment' based upon our practical knowledge of how things are done 'back home' " (*ibid*). The Attorney General's Committee found that "in any event, when a referee is called in, the proceeding before the Board is much like true adjudication" (*ibid*).

This Court is not now called upon to resolve the troublesome question as to the nature of the Board and its functions. We have called attention to the controversy, however, because it affects the practice of the Board in several respects pertinent here.

(a) As a result of their view that the Board is a continuance of the negotiations on the property, the employee members have refused to permit the Board to hear cases not submitted by the organization representing the majority of a craft or class. Each division of the Board deadlocks as to whether cases submitted by individuals may be heard at all, and the result has been that they have

not been heard."[23] In at least three instances referees appointed to break such deadlocks have held that individuals have no standing before the Board. *Gooch* v. *Ogden Union Ry. Co.*, National Railroad Adjustment Board, Second Division, Award No. 514 (Referee McAllister); *Everly* v. *Erie R. Co., id.*, Award No. 515 (Referee McAllister); *Rudd* v. *Minneapolis, etc. Ry. Co.*, National Railroad Adjustment Board, Third Division, Award No. 1718 (Referee Sharpe). Whether this result is right or wrong,[24] it has the effect of preventing persons whose cases are not sponsored

[23] This question is discussed in Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 7–10; *Compilation*, pp. 233–234. The *Final Report of the Attorney General's Committee on Administrative Procedure* states (p. 188): "The Board has deadlocked upon the question whether employees in person, as distinguished from labor organizations, should be permitted to bring their claims before the Board. The effect of this deadlock has been that no such claims are set down for hearing."

[24] The statute declares that the Board shall hear "disputes between an *employee* or group of employees and a carrier or carriers" (Section 3, First (i)), that "Parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect" (Section 3, First (j)), that notice of hearing shall be given "to the *employee* or employees and the carrier or carriers involved" (*ibid.*), and that *any person* for whose benefit an award is made may sue on the award in a United States District Court (Section 3, First (p)). (Italics supplied.) The courts have indicated that they disagree with the view that individuals have no right to appear before the Board except through the labor organizations. *General Committee of Brotherhood of Locomotive Engineers* v. *Southern Pacific Company*, 132 F. (2d) 194 (C. C. A. 9); *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7),

by the majority organization from having their claims decided by the Board, and if the Board were regarded as having exclusive jurisdiction, would make the organizations' decisions as to their cases conclusive.

(b) The Board's procedure is more closely akin to that of the boards which were its predecessors than to that of the ordinary administrative agency. There are no responsive pleadings; both sides of the case must be submitted simultaneously (Attorney General's Committee on Administrative Procedure, *Railway Labor,* Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 11–12 (*Compilation,* pp. 238–239)). The material submitted consists of intermingled fact and argument; the Board has no power of subpoena and evidence is not taken, although oral arguments are heard (*id.,* at pp. 12–14, *Compilation,* pp. 239–242). The case is explained to the referee by the other members of the Board, not by the parties (*id.,* at pp. 15–16, *Compilation,* pp. 242–243). Although the Attorney General's Committee made some suggestions for the improvement of this procedure, it did not find it to be fundamentally unfair. See *Final Report of the Attorney General's Committee on Administrative Procedure,* pp. 185–188; see also Garrison, *The National Railroad Adjustment*

certiorari denied, 300 U. S. 673; *Estes* v. *Union Terminal Company,* 89 F. (2d) 768 (C. C. A. 5). See also House Hearings, p. 83; William H. Spencer, *The National Railroad Adjustment Board* (University of Chicago Press, 1938), p. 39, *Compilation,* Appendix, p. 189.

Board: A Unique Administrative Agency, 46 Yale L. J. 567 (1937), reprinted in *Compilation,* Appendix, pp. 110–135. The facts of the cases are usually well known to the parties and disclosed by the file of the negotiations on the property. The Attorney General's Committee estimated that in only five percent of the cases were there any fact issues with respect to which evidence would have been helpful (*Final Report,* p. 187).

The Court is not, of course, required in this case to pass upon the validity of these departures from orthodox administrative procedure. We have referred to them so that the Court may have the information before it, in view of petitioner's contention that the Board's procedure should be given consideration in determining whether the Board's jurisdiction is exclusive and its awards "final and binding."

(c) The bipartisan nature of the Board is reflected both in its inability to agree on rules of procedure and in the failure of the First Division, from which this case arose, to keep up with its docket. In 1940, when the report of the Attorney General's Committee on Administrative Procedure was prepared, the Division was "more than three years behind its docket" (p. 188). Between 1940 and 1942 the number of undisposed cases on hand at the close of the fiscal year rose from 4298 to 6033, leaving the Division between four and five years behind (National Mediation Board,

Eighth Annual Report, p. 45).[25] The members of the Division have been unable to agree upon a means of removing this congestion, although the statute permits them to sit in panels (Sec. 3, First (k)), or to establish regional boards (Sec. 3, First (w)).[26] This condition might affect the desirability of making the Board the exclusive forum for the disposition of such cases.

3. *The adjustment boards and the courts.*

The reported cases arising before the 1934 Act, and involving the interpretation of railway labor agreements establishing an adjustment procedure, fall into several categories. Some of these proceed to interpret the agreement without regard for, or even awareness of, the availability of any other procedure, although it would appear that an adjustment board covering the employees and carriers involved was in existence.[27] Other cases hold that an employee must avail himself of the adjustment provisions of the contract governing

[25] The Railway Labor Act of 1934 was entitled "AN ACT * * * to provide for the *prompt* disposition of disputes between carriers and their employees" (48 Stat. 1185. [Italics supplied.] See also Sec. 2 (General Purposes (4, 5)).

[26] At the present time the Office of Defense Transportation, at the request of the President, is endeavoring, thus far unsuccessfully, to see if the parties will agree to steps through which the jam can be broken.

[27] See, e. g., *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936). The Louisville & Nashville Railroad was a party to the agreement creating a Southeastern Regional Adjustment Board for train service employees (*Compilation*, Appendix, pp. 39–42; see pp. 14, 16, *supra*).

his crafts before resorting to the courts; these decisions generally are based upon the principles of contract law,[28] although there is occasional reference to the Railway Labor Act as well.[29] And another group of cases holds that an employee can go to court without availing himself of the remedies prescribed in the contract or under the Act where for one reason or another such action would be futile.[30]

After the 1934 Act became effective, but before this Court's decision in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, there were only a few reported instances of suits brought by employees who had not gone to the Adjustment Board.[31] The Fifth

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[28] *Harrison* v. *Pullman Co.*, 68 F. (2d) 826 C. C. A. 8); *Bell* v. *Western Railway*, 228 Ala. 328, 153 So. 434 (1934); *Wyatt* v. *Kansas City Ry. Co.*, 101 S. W. (2d) 1082 (Tex. Civ. App., 1937); *Swilley* v. *Galveston, etc., Ry. Co.*, 96 S. W. (2d) 105 (Tex. Civ. App., 1936); *Matlock* v. *Gulf, C. & S. F. Ry. Co.*, 99 S. W. (2d) 1056 (Tex. Civ. App., 1936); *Cousins* v. *Pullman Co.*, 72 S. W. (2d) 356 (Tex Civ. App., 1934); *Reed* v. *St. Louis S. W. R. Co.*, 95 S. W. (2d) 887 (Mo. App., 1936).

[29] *Bell* v. *Western Ry.*, 228 Ala. 328, 153 So. 434 (1934); *Wyatt* v. *Kansas City Ry. Co.*, 101 S. W. (2d) 1082 (Tex. Civ. App., 1937).

[30] *Youmans* v. *Charleston & W. C. Ry. Co.*, 175 S. C. 99, 178 S. E. 671 (1935); *Mallehan* v. *Texas & Pacific Ry. Co.*, 87 S. W. (2d) 771 (Tex. Civ. App., 1935).

[31] *McDermott* v. *New York Central R. Co.*, 32 F. Supp. 873 (S. D. N. Y.); *Evans* v. *Louisville & N. R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940); *Ledford* v. *Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 306, 18 N. E. (2d) 568 (1939). In the *Ledford* case the complainants had sought to go to the Adjustment Board, but the Board had refused to docket the case. See pp. 25–26, *supra*.

Circuit Court of Appeals had held in the *Moore* case itself that preliminary resort to the Adjustment Board was unnecessary, and there was a dictum to the same effect in *Nord* v. *Griffin*, 86 F. (2d) 481, 483–484 (C. C. A. 7), certiorari denied, 300 U. S. 673. There have been several independent court actions by employees since then.[32] These cases have held that under the rule of the *Moore* case an employee has an election between suing in court and proceeding before the Board, but that he cannot do both.[33] So far as we know, there have been no cases brought by carriers before submission of a claim to the Adjustment Board.

More significant than the small number of decisions is the apparent attitude, if it can be so called, of the parties toward the judicial method of resolving this type of controversy. In so far as the legislative history of the 1934 Act indicates, it never occurred to anyone that the courts afforded a forum in which such matters might be determined. Prior to 1934, it was assumed that if disputes were not disposed of by the parties amicably or by an adjustment board the only alternative was to threaten the use of economic

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[32] *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808, 810 (C. C. A. 7); *Austin* v. *Southern Pac. Co.*, 123 P. (2d) 39 (Cal. App., 1942); *Burke* v. *Union Pacific R. Co.*, 129 F. (2d) 844 (C. C. A. 10); *Swartz* v. *South Buffalo Ry. Co.*, 44 F. Supp. 447 (W. D. N. Y.).

[33] *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808, 810 (C. C. A. 7); *Austin* v. *Southern Pac. Co.*, 123 P. (2d) 39 (Cal. App., 1942).

force. We do not know whether the failure of the employees to resort to the courts was due to a belief that such matters could not be heard in the courts, to a belief that the judicial remedy was expensive and time consuming and that the carrier had superior facilities for engaging in litigation (R. 334), to a feeling that the courts were not sufficiently expert or inclined to understand the employees' point of view, or merely to the employees' greater faith in their own bargaining power—or to these factors in combination. Whatever the reason, it is clear that the industry regarded some other type of machinery as essential.

The reluctance of labor to use the courts is evidenced by its failure to make any extensive use of the enforcement procedure available under Section 3, First (p) after awards had been entered in its favor. The various divisions of the Adjustment Board have entered thousands of awards.[34] Only a few have been enforced through proceedings instituted under paragraph (p).[35]

[34] The number of awards is stated in the Annual Reports of the National Mediation Board.

[35] Reported cases are: *Atlantic Coast Line R. Co.* v. *Pope*, 119 F. (2d) 39 (C. C. A. 4); *System Federation No. 59* v. *La. & Ark. Ry. Co.*, 119 F. (2d) 509 (C. C. A. 5), certiorari denied, 314 U. S. 656; *Thomas* v. *Texas & N. O. R. Co.*, 118 F. (2d) 75 (C. C. A. 5) (for the same case see also 162 S. W. (2d) 1039 (Tex. Civ. App., 1942)); *Cleapor* v. *Atlanta, B. & C. R. Co.*, 123 F. (2d) 374 (C. C. A. 5); *Virginian Ry. Co.* v. *System Federation No. 40*, 131 F. (2d) 840 (C. C. A. 4); *Smith* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013 (W. D.

The Attorney General's Committee on Administrative Procedure found:[36]

> Theoretically, the railroads do not need to comply with an award until an action is brought in court to enforce the award. The theory does not accord with the fact, however. Of about 5,000 awards that the Board has made to date, not more than a half dozen enforcement proceedings in court have been brought, and yet the great preponderance of the awards have been complied with. Some awards, however, are never enforced either by court action or by economic force, either because of doubts as to the success of litigation, or because of insufficient general importance.

This report, an article by Dean Lloyd Garrison,[37] and the brief of the respondents in the District Court (R. 103) recognize that the primary sanction relied on to enforce the Board's orders has been the economic bargaining power of the employees, and we do not think it will be denied that the employees' organizations whose cases are

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La.); *Alabama State Federation* v. *Kurn*, 46 F. Supp. 385 (N. D. Ala); *System Federation No. 8* v. *Missouri-K.-T. R. Co.*, 40 F. Supp. 803 (N. D. Tex.); *Cook* v *Des Moines Union Ry. Co.*, 16 F. Supp. 810 (S. D. Iowa). Only the last of these cases involved a decision of the First Division of the Adjustment Board.

[36] Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 6 (Compilation, p. 233).

[37] Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 591–592 (1937) (*Compilation*, Appendix pp. 129–130).

handled by the First Division have adopted the policy of not taking cases to the courts."[28] There have been approximately eight threats to strike against carriers which declined to comply with orders of the Adjustment Board. These disputes were all settled peacefully, generally through compliance by the carrier with the Board's awards.[29]

There have also been a few suits to enjoin carriers from giving effect to Adjustment Board orders. *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5); *Brand* v. *Pennsylvania R. Co.*, 22 F. Supp. 569 (E. D. Pa.); *Stephenson* v. *New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937); *Railroad Yardmasters of North America* v. *Pittsburgh & Lake Erie R. Co.*, 39 F. Supp. 876 (N. D. Ohio). These cases have generally been brought by employees aggrieved by Board decisions affecting their seniority, not by the railroad labor organization, and injunctions have been granted when it was found that the Board had violated due

[28] The position of the employees' representatives is that if they accept the awards, the carriers should do likewise, that they have no means of contesting an award when they lose and that accordingly it is unfair to give the carrier a chance to challenge an award when it loses, that taking the cases to court would cause further long delays before awards were obeyed, and that the carriers have a large body of lawyers available to give them an unfair advantage over the employees if cases have to be taken to court.

[29] This information was obtained from the files of the National Mediation Board.

process by not giving the claimants notice of its hearings (*Nord* v. *Griffin; Brand* v. *Pennsylvania R. Co., supra*) or that the Board had acted without jurisdiction (*Stephenson* v. *New Orleans & N. E. R. Co., supra*).

B. WHETHER PARTIES MAY RESORT TO THE COURTS BEFORE SUBMISSION OF A CONTROVERSY TO THE NATIONAL RAILROAD ADJUSTMENT BOARD

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, this Court held that an employee was not required to seek adjustment of his controversy with a carrier before the National Railroad Adjustment Board as a prerequisite to the institution of a lawsuit. The United States filed a brief as *amicus curiae* in the *Moore* case. The Government was of opinion that the question was a close one, and that the various factors to be considered did not point conclusively in either direction. We suggested that a possible solution of the problem would be to permit court action by individuals who could not, without the use of some mandatory process, bring their cases before the Adjustment Board, but not otherwise.

The Court held, however, that resort to the statutory machinery was not compulsory. The Court has now requested a reconsideration of the matter. Even if the Court should not treat the *Moore* case as controlling, the choice it made between the various arguments advanced is entitled to weight. It is on this basis that we have reexamined the questions decided in the *Moore* case.

1. Considerations relating to the Railway Labor Act

(a) The statute declares that unadjusted disputes *may* be referred to the Adjustment Board. The word "may" could have been used either to show that parties were not required to go before the Adjustment Board at all, or that they need not appeal a particular case unless they desired to do so. In the *Moore* case, this Court adopted the former interpretation, saying (312 U. S., at 635):

> It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *" This difference in language, substituting "may" for "shall", was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. * * *

The legislative history of the 1934 Act is consistent with the above conclusion.[39a] The advantages which Mr. Eastman thought would accrue from the uniform interpretation of railway labor agreements by a single body did not lead to his refusal to accept regional or local adjustment boards, whenever the parties could agree to establish them (see pp. 19–21, *supra*).

(b) The primary purpose of the Railway Labor Act was the settlement of disputes peacefully without interruption to transportation. Since judicial proceedings are a peaceful means of resolving disputes, the possibility of resort to the courts is entirely compatible with this basic objective. On the other hand, the uniform interpretation of such agreements by a single expert tribunal would eliminate the possibility of discrimination between men working on different parts of the same road or on different roads, and thus remove one cause of dissatisfaction and controversy.[40] Fur-

[39a] The *Moore* opinion refused to draw the inference that the Board was intended to have as broad a jurisdiction as the prior adjustment and arbitration (see pp. 85–88, *infra*) boards to which disputes were required by agreement to be submitted.

[40] See Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (*Compilation*, Appendix, pp. 110–135). The cases which come before the Board arise out of numerous technical rules with "intricate" interpretations. Attorney General's Committee on Administrative Procedure; *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 3 (*Compilation*, p. 229); Garrison, *supra*, pp. 586–591 (*Compilation*, Appendix, 125–129). A definite advantage is to be derived

thermore, compulsory use of the machinery established by the statute would (except for those cases which go to referees) in substance result in the settlement of cases by agreement between the carriers and the unions. Such a solution of a dispute would probably be more consistent with harmonious labor relations than the peaceful but compulsory acceptance of judicial decisions. We believe that the advantage of decisions to which both sides have agreed is the basic reason for the use of the adjustment board device.

But the benefits of a uniform interpretation by a single body of experts and of a decision resulting from agreement between the representatives of the carriers and the employees are not to be found in the large proportion [41] of the cases which are decided with the assistance of referees. The referees are not necessarily experts in the railway labor field,[42] and their decisions are not neces-

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from having such cases decided by persons familiar with the subject and its terminology, and not by persons having "no practical experience of railroading." Garrison, *supra*, p. 593 (*Compilation*, Appendix, p. 131).

[41] Approximately one-half. See report of Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 1, 15 (*Compilation*, p. 242); National Mediation Board, *Eighth Annual Report*, p. 45.

[42] Dean Garrison's article states in this connection:

> * * * With rarest exceptions, the referee, to be neutral, must be drawn from outside the railroad world. He comes to the Board with no practical experience of railroading. Its vocabulary, its customs are strange to him. He cannot catch the undertones of

sarily uniform."[43] The parties frequently do not acquiesce in referees' decisions;[44] thus, they do

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the cases, or weigh as surely as one bred to the trade the force of the rival contentions addressed to him. He cannot appreciate with any certainty the implications, for future cases, of the decisions he must render. He has no fellow-judges to consult with. Nearly every case comes up to him evenly balanced, strenuously fought, and freighted with importance not only to both sides but to all other carriers and unions for whom the decision will stand as a precedent. And his will be the final say, for he knows that there will be no review. Try as he will he is bound to make mistakes which a more experienced judge would not make. And these mistakes may be costly and wide-reaching in their effects. When he is through with the cases assigned to him, and has begun to gain some insight, he is not likely to be reappointed to the Division in which he sat, for he will probably be unwanted either by the labor members or the carrier members or both; and the National Mediation Board (which has to make the appointments since the Divisions are not able to agree upon mutually satisfactory persons) quite properly will not appoint unwanted men. * * *

Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 593–594 (*Compilation*, Appendix, p. 131–132). The Annual Reports of the National Mediation Board show that since 1935 only one referee has sat with the First Division during more than three fiscal years, and one other during as many as three fiscal years. Other Divisions have often been able to agree upon referees, and referees have been more frequently reappointed.

[43] See report of Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 19 (*Compilation*, p. 247).

[44] "Yet, identical problems repeatedly have to be carried all the way to a referee before the parties will consider themselves bound. When the same problem has been decided hundreds of times by many different referees, and when all

not have the harmonious effect of a determination agreed upon by representatives of both sides.

The cases submitted to the referees comprise those in which there is undoubtedly the bitterest conflict. We are not inclined to believe that there is any great difference in the effect upon amicable labor relations between decisions rendered by the referees in such cases (most of whom now are judges),[44] and those rendered by courts. In

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decisions are in agreement, principles that should be regarded as established are not always recognized by the parties. * * * In the application of the 'road yard' rule, for instance, the decisions have uniformly accepted the basic principle advocated by labor, but the carriers have consistently refused to acquiesce in that principle. As a result cases involving the 'road yard' rule are seldom settled on the property of the carrier, the Board nearly always deadlocks such cases, and they almost invariably have to be decided by referees. The failure to acquiesce in decisions of the Board is one substantial cause of the large volume of business of Division I. * * *" *Ibid.* Illustrative of the parties' attitude are (1) the withdrawal by the employees of cases submitted to Justice Royal A. Stone as referee after his conclusions had been made known but before his opinions were filed, and the resubmission of the cases to the Board in the hope of getting a different result (*Delaware & Hudson R. Corp.* v. *Williams*, 129 F. (2d) 11 (C. C. A. 7), judgment vacated December 7, 1942, Nos. 446-447, this Term), and (2) the attempt by the carriers to disqualify Justice Paul W. Richards as referee because of disagreement with some of his prior decisions in other cases (See National Mediation Board, *In the Matter of Protest of Carrier Members against the appointment of Justice Paul W. Richards as Referee*, decided June 5, 1941; *Seventh Annual Report*, p. 11).

[44] In the past several years, the National Mediation Board has generally appointed State supreme court judges as referees. National Mediation Board, *Seventh Annual Report*, p. 46; *Eighth Annual Report*, pp. 46–47.

each instance the decision is reached by the peaceful process of adjudication, and a strike against it is unlikely. In neither instance does the losing party regard the decision as one to which he has agreed. It is not unlikely that the judgment of a court, which is directly enforceable, would be treated with more respect than is such an award of the Board."

(c) The practice of the Board in refusing to hear cases not submitted by the representative of the majority of a craft is not consistent with the notion that the Board has exclusive jurisdiction of the type of cases which come before it. See pp. 25–27, *supra*.

(d) Most courts, both before and after this Court's decision in the *Moore* case, seem to have held, or assumed, that the jurisdiction of the Adjudgment Board is not exclusive. See pp. 29–31, *supra*.

2. Considerations applicable to administrative bodies generally

It can be argued that the establishment of the Adjustment Board in itself manifests a congressional intention that all disputes coming within its jurisdiction be submitted to it rather than to the

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[46] See Note 44, *supra*. Since a judicial decree is enforceable, employees would never be faced with the necessity of threatening to call a strike to obtain compliance with a court order, although they have engaged in such tactics with respect to some Adjustment Board awards. See pp. 33–34, *supra*.

courts. But it can also be argued that the failure of Congress to declare that the Board was to have exclusive jurisdiction, in a field in which common-law remedies are available, indicates that the pre-existing remedies were not to be destroyed.

Examination of the language of statutes creating other administrative bodies and of the decisions under them reveals the absence of any uniform legislative or judicial policy which might be controlling here. In some instances Congress has specified that an administrative remedy is to be exclusive, as in the National Labor Relations Act [47] and the Longshoremen's and Harbor Workers' Compensation Act.[48] Frequently it is clear from the fact that the statute regulates an entirely new field that only statutory remedies are to be available.[49] On the other hand, Congress has also specifically provided, as in the Interstate Commerce Act,[50] the Civil Aeronautics Act [51] and the statutes administered by the Securities and Exchange Commission, [52] that existing remedies are

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[47] c. 372, 49 Stat. 449, 29 U. S. C., Section 160 (a); *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

[48] c. 509, 44 Stat. 1424, 33 U. S. C., Section 905.

[49] See, *e. g.*, Bituminous Coal Act, c. 127, 50 Stat. 72, 15 U. S. C., Sections 828–851; Packers and Stockyards Act, c. 64, 42 Stat. 159, 7 U. S. C., Sections 181–231.

[50] c. 104, 24 Stat. 379, 49 U. S. C., Section 22.

[51] c. 601, 52 Stat. 973, 49 U. S. C., Section 676.

[52] c. 38, 48 Stat. 74, 15 U. S. C., Section 77p; c. 411, 53 Stat. 1149, 15 U.S.C., Sections 77www (b); c. 404, 48 Stat. 881, 15 U. S. C., Sections 78bb; c. 687, 49 Stat. 803, 15 U. S. C., Section 79p.

not to be abridged. And some statutes, such as the Safety Appliance Act,[53] which contains no express provision one way or the other, have been construed as permitting private persons to enforce their rights in courts as well as before the administrative tribunal.

Most pertinent would appear to be the interpretation given Section 16 (2) of the Interstate Commerce Act, which is in substantially the same language as Section 3, First (p) of the Railway Labor Act, and upon which the latter provision was modeled. See p. 91, *infra*. In a long series of cases, this Court has held that when a question presented is administrative rather than judicial, or where there was an evidentiary question upon which fact-finding bodies might differ and thus interfere with the uniformity which the Interstate Commerce Act was designed to secure, the matter must first be submitted to the Interstate Commerce Commission. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, and cases cited at 295 n. But where the question was merely whether there had been compliance with a tariff, or was one of construction of words

[53] c. 160, 36 Stat. 298, c. 225, 35 Stat. 476, 45 U. S. C., Sections 15, 19; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 39.

used in their ordinary sense, preliminary resort to the Commission was unnecessary. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 134; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; and cases cited at 295 n.; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448.

The drawing of conclusions from one statute as to the interpretation to be given an entirely different law is an uncertain approach, even where some of the language employed is similar. Although Sections 16 (2) of the Interstate Commerce Act and 3, First (p) of the Railway Labor Act are substantially the same, the other differences between the two statutes are so great as to make it clear that each section must be fitted into its particular setting. The Interstate Commerce Act specifically gives a shipper a choice between a suit in court and the commencement of proceedings before the Commission (Section 9). It further provides (Section 22) that:

> * * * nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the remedies of this act are in addition to such remedies * * *.

Despite these seemingly explicit provisions, it is established, as we have indicated, that in certain types of cases a complaint must first go before the Interstate Commerce Commission in order that

the basic objectives of the vital substantive provisions of that Act may be achieved.

The primary reason for first requiring resort to the Interstate Commerce Commission in such cases does not apply to the Adjustment Board. The latter body does not exercise administrative discretion; nor do many of its decisions turn upon disputed questions of fact. See pp. 27–28, *supra*. To the extent that they do, the Board is in some respects less fitted to resolve them than are the courts, since the Board has no subpoena power and under its rules does not permit the presentation of evidence or the examination of witnesses.[54] The Adjustment Board, all of whose permanent members are experienced railroad men, may however, be more expert than the courts in interpreting the contracts over which it has jurisdiction.[55] In so far as a uniform interpretation is deemed desirable, it would be wise to require cases involving such contracts first to be submitted to the Board. But the provisions in the Act for the creation of regional and local adjustment boards show that the object of the Railway Labor Act was not primarily to secure uniformity in the interpretation of these agreements.

In view of these considerations, we believe that no definite conclusion can be drawn from an anal-

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[54] Report of Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 6n. (*Compilation*, p. 233n.).

[55] *Ibid.*

ysis of the Interstate Commerce Act or any other statute as to whether the Board established under the Railway Labor Act was intended to have exclusive jurisdiction. The variety of statutes and decisions shows that the present problem cannot be solved by any automatic rule pursuant to which a statute establishing an administrative body is inevitably construed in one way or the other. In each case all of the manifold factors which guide courts in construing statutes are given consideration, and the determination made as to what Congress would have intended in the particular act involved.

When a statute creates new rights and establishes an agency to administer them, it may normally be presumed, even in the absence of express language to that effect, that the legislature intended the agency to have exclusive primary jurisdiction. But the Adjustment Board does not administer or pass upon rights created by the Railway Labor Act, but upon contract rights previously recognized and enforced in other forums. The Board is also not strictly comparable to other administrative bodies, in that it stems from boards established by agreement whose functions were clearly the settlement of disputes through adjustment rather than adjudication.

It is conceivable that Congress could have designed the Adjustment Board either as a supplement to or a substitute for the existing remedies for breach of railway labor contracts. Whether it has or not must be determined by the particular

intention of the Congress which passed the Railway Labor Act, rather than by the invocation of any general principle of administrative law.

3. Conclusion

As was indicated by the Government's brief in the *Moore* case, we think that the question as to whether an employee or carrier may proceed only before the Adjustment Board is a close one. The various manifestations of congressional intention point to no definite conclusion. In such circumstances, the controlling consideration should be the effect of the proposed interpretation upon the attainment of the objectives of the Railway Labor Act, provided that this may not be said to be inconsistent with the *method* intended by Congress.

With respect to disputes settled without referees, decisions by a board made up of representatives of the carriers and the employees are more likely to be willingly accepted by both sides, and thus less likely to result in interruptions to commerce, than would the decisions of courts. This is less true, we believe, as to the cases decided with the assistance of referees. Experience under the present Board suggests that judicial determinations would cause no more, and might cause less, ill feeling than the decisions of the referees (see p. 39, n. 44, *supra*). However, the possibility of resort to different tribunals in itself might result in disharmony, to the extent that court and Board decisions might be less uniform

than decisions of the Board alone including its referees.

In so far as actual interruptions to transportation are concerned, we cannot say that strikes are more likely to occur if the parties are permitted to take their cases either to the courts or to the Board. Such cases have almost invariably been brought by the employees rather than by the carriers. In accordance with their past practice, the railroad labor organizations would almost certainly take their cases to the Board, and if they chose to use the courts in a particular instance, there would be no reason to anticipate that the judicial decision would not dispose of the controversy. Most of the cases taken to the courts probably would be brought by individual employees or groups not desiring to have their cases handled by the majority organization. This is the situation at the present time. Such persons or groups might be unable to induce the Board to decide their cases at all, or might be unwilling to submit themselves to a bipartisan board where the interests of the labor members might well be adverse.[56] We assume that even if it should be held that the employees were as a general rule required to go to the Board instead of to court, this would not apply to persons whose cases the Board refused to hear.[57]

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[56] E. g., *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

[57] See cases cited, *supra*, p. 30, n. 30, and *Ledford* v. *Chicago M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 18 N. E.

The considerations which we have advanced were, in substance, before this Court when the *Moore* case was heard in 1940. The Court held at that time that the statute did not preclude a party from resorting to the courts without first going to the Adjustment Board. We assume that under the principle of *stare decisis* decisions of this Court will not be overruled lightly or unnecessarily. Once the Court has decided a question one way, the burden of persuasion should be on the one who seeks to have the decision overruled. Since we are not convinced that the conclusion reached in the *Moore* case was erroneous, or that it has in any way impaired the effectiveness of the Railway Labor Act as a means of avoiding interruptions to commerce, we do not feel justified in requesting its reversal.[58]

(2d) 568 (1939). In the *Moore* case, the record did not show that the plaintiff had requested the majority organization to take his case to the Board, or that he had done so himself, but his past relations with the organization were such that he might reasonably have assumed either that it would have refused to handle his case or not represented him very zealously.

[58] Inasmuch as there was no evidence in the *Moore* case that the plaintiff had attempted to have the labor organization take his case to the Board, or that he had tried to do so himself (see n. 57 *supra*), the case cannot be distinguished on the ground that it involved a situation in which such efforts were unsuccessfully made. If the Court should desire to limit the *Moore* decision, it should not require an employee to do more than show that the majority union has declined to present his case. Since the filing of proceedings with the Board by the individual would under such circumstances be futile, and since the Board generally does not issue a formal

C. WHETHER PARTIES MAY RESORT TO THE COURTS AFTER SUBMISSION OF A CONTROVERSY TO THE NATIONAL RAILROAD ADJUSTMENT BOARD

The problem presented after a case has been submitted to the Adjustment Board differs from that previously considered. The existence of alternative means of resolving disputes as to the interpretation of railway labor agreements does not foreclose giving exclusive effect to the machinery created by the Railway Labor Act once it has been invoked. The statutory provision primarily involved *before* the case comes to the Board is Section 3, First (i); the provision concerning enforcement of the Board's orders after it has acted is Section 3, First (p), which reads as follows:

> If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall

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ruling declining jurisdiction, to require a refusal by the Board itself would merely serve to exhaust the period of limitations in which a person would be able to sue in court.

> proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

The question may be separately considered in relation to two chronological periods: (1) while the proceeding is pending before the Adjustment Board, and (2) after the Board has made its decision.

1. While the proceeding is pending before the Adjustment Board

Since this question is not raised in the present case, it is unnecessary to consider it at length. We think it clear, however, that when Congress provided that the parties might submit unadjusted

disputes to the Adjustment Board, and that the Adjustment Board might enter awards and orders, it did not intend that the proceedings before the Board could be set at naught by an independent action seeking a determination of the same question before another tribunal.

Such suits would be based upon contracts, and would be actions *in personam*. Under the rule governing concurrent suits *in personam* in federal and state courts [89] two actions may proceed independently, although a judgment in either is *res judicata* in the other. *Kline* v. *Burke Construction Co.*, 260 U. S. 226; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195; *Princess Lida* v. *Thompson*, 305 U. S. 456, 466. The result would be that if one party to a dispute instituted proceedings before the Board and the other party preferred a different forum, the latter could file a suit in court. If the cases were so timed that judgment was first rendered in the judicial proceeding, the jurisdiction of the Board would be lost, and the statutory machinery made inoperative.[90]

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[89] The judicial proceedings would normally be brought in a state court, unless the requisites of federal jurisdiction were present. Such suits are not regarded as based upon the Railway Labor Act or any federal statute. *Malone* v. *Gardner*, 62 F. (2d) 15 (C. C. A. 4); *Burke* v. *Union Pacific R. Co.*, 129 F. (2d) 844 (C. C. A. 10); *McDermott* v. *New York Central R. Co.*, 32 F. Supp. 873 (S. D. N. Y).

[90] A decision of the Board, however, would be *res judicata* in the courts only to the extent that the Board's order could not be judicially reviewed; an order could, of course, be set aside in an enforcement suit brought under Section 3,

Such unseemly competition between adjudicatory bodies, even if permissible under the common law, is hardly consistent with the purpose of Congress, as expressed in the Railway Labor Act (Sec. 2), "to provide for the prompt and *orderly* settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Nor would such a race for the tribunal deemed most favorable be conducive to harmonious labor relations. The decisions or awards in such circumstances would not be accepted as the ruling of an impartial, or bipartisan body, but as the unfortunate consequence of being in the wrong court, or of bad timing. Ill will would almost inevitably be engendered. Thus, to construe the Act as allowing resort to the courts while a case was before the Adjustment Board might undermine its primary objective, the peaceful and amicable settlement of labor disputes.

Even apart from the Railway Labor Act the general policy of the courts not to take action which will interfere with proceedings pending before administrative agencies is pertinent. E. g. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. To permit the bringing of an independent suit on the same cause of action while a case is pending before the Board would certainly under-

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First (p). Since the First Division of the Board is now years behind in its docket (see pp. 28–29, *supra*), the judicial proceeding would probably be concluded first.

mine its effectiveness as much as a direct interference with its operations.

2. After the Board has made its decision

After the Board had made its decision, all further proceedings, whether by way of enforcement suit or an independent action on the contract, would take place in the courts. There would thus no longer be the possibility of conflict between judicial and administrative tribunals. The question is whether when Congress established a special judicial procedure through which the Board's orders might be enforced or set aside, it intended that the courts review the orders in other ways.

We believe that this question should be answered in the negative. There would, of course, be no doubt as to this if the statute contained express language making paragraph (p) the exclusive method of judicial enforcement or review. While the problem is not that simple, the adequacy of the statutory remedy, the advantages it was designed to give the employees, and comparison with the closely parallel provisions of the Interstate Commerce Act indicate that paragraph (p) was probably designed as an exclusive review procedure.[61] This conclusion is, to some extent,

[61] As we shall show, the statutory remedy is legally adequate both for the carriers and for employees who invoke the services of the Adjustment Board, whether they win or lose. This might not be the case as to other employees who are adversely affected by a Board award and who are, or should be, parties to a proceeding before the Board. *Nord*

confirmed by the "final and binding" clause in Section 3, First (m), which may be interpreted as requiring that the Board's orders (except for money awards) be final, except as otherwise provided in the Act or required by the Constitution. This is the point raised by this Court's Fourth Question, and it is considered at greater length *infra*, pp. 70–95.

a. *The adequacy of the remedy.* On its face, paragraph (p) purports to provide a remedy only where the award is in favor of the employee and where the carrier does not comply. But the failure of the statute to provide expressly for judicial review at the instance of the carrier does leave the remedy inadequate. This will appear from an analysis of the four situations in which review might be sought: (1) the right of the employee if he is successful before the Board; (2) the right of the carrier when it is successful before the Board; (3) the right of the employee

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v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5); *Brand* v. *Pennsylvania R. Co.*, 22 F. Supp. 569 (E. D. Pa.); *Stephenson* v. *New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937). Such persons would have no right to judicial relief under paragraph (p), nor would they be able, as is the carrier, to await a proceeding against them before complying with the award. If the carrier obeys the Board's order, they would be remediless. Such persons have been held entitled to judicial relief by way of injunction in the cases cited, and nothing said in this brief is to be regarded as directed at their special problem. This Court is, of course, not called upon to determine the rights of such persons in this case.

who has lost before the Board; and (4) the right of the carrier who has lost before the Board.

(1) If the employee wins his case before the Board, he may sue for enforcement under paragraph (p).

(2) If the carrier wins before the Board, it has no statutory right to sue. But it has the power to put the Board's decision into effect without the aid of any enforcement procedure. Although the Act permits carriers as well as employees to bring cases to the Board, substantially all of the cases consist of claims by employees against the carriers, seeking either monetary awards or changes in practices allegedly required by the terms of the agreements. The cases are almost invariably brought to the Board by the employee[42] and Congress understood that this would be so.[43] An award in favor of the carrier would deny the employees' claim, and the carrier could put the award into effect itself simply by not paying the amount demanded or otherwise doing what the employee requested.[44] There was accordingly no need for

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[42] See *Final Report of Attorney General's Committee on Administrative Procedure*, p. 186.

[43] Section 3, First (o) speaks of an order in favor of "petitioner", directed to the carrier, and paragraph (p) refers to the "petitioner" bringing suit against the carrier if the latter does not comply with the Board's order. This suggests that Congress assumed that the employee would normally be the petitioner before the Board. See Senate Hearings, p. 33.

[44] The Act was prepared on the assumption that the employees would not strike against unfavorable awards. See

giving the carrier a remedy such as that made available to the employee in paragraph (p). This was pointed out to the House Committee by Coordinator Eastman [64] and his assistant, Mr. Carmalt.[65] Mr. Carmalt stated that "the carrier had the power in its hands to enforce the awards of the Board as against the individual."[66]

(3) An employee who has been denied relief by the Board would appear to have no further remedy. He certainly has none under the Act. The carrier can proceed to make such an award effective by itself (*supra*). The employees' position would seem to be the same as that of a shipper who has unsuccessfully brought a claim for reparations before the Interstate Commerce Commission. If he loses he cannot have the order overturned in court.[67] This results under the Railway Labor Act from the fact that the employee voluntarily invoked the services of the Board, foregoing his alternative right to sue in court in the first instance (*Moore* v. *Illinois Central R.* Co., 312 U. S. 630, see pp. 35–49, *supra*.[68]

House Hearings, pp. 63–64, 58–59; Senate Hearings, p. 35. This assumption has been justified. The strike threats referred to by petitioner were to compel the carriers to obey awards in favor of the employees.

[64] See House Hearings, p. 61.

[65] *Id.*, at page 63.

[66] *Ibid.*

[67] See pp. 62–64, *infra*.

[68] This reasoning of course would not apply if the Court should now overrule the *Moore case* and hold that the employees could not resort to the courts in the first instance.

Once he has made his election to use the statutory machinery, he cannot complain that the remedy is inadequate. Cf. *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 457–458; *Austin* v. *Southern Pac. Co.*, 123 P. (2d) 39 (Cal. App. 1942).

(4) The position of an unsuccessful carrier before the Board is greatly superior to that of an unsuccessful employee. For the Board's award is not self-enforcing against the carrier. Thus, the carrier can refuse to comply until and unless a proceeding is brought against it under paragraph (p). When such a suit is brought, the award is only *prima facie* evidence of the facts stated, and the carrier can defend as in any other civil action. That such a procedure provides an adequate remedy for the losing party, consistent with the Constitution, would seem to follow from the reparations cases under the Interstate Commerce Act. *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810 (S. D. Iowa).

The inability of the carrier to bring an independent action to set aside the award does not make this defensive remedy inadequate. Prior to the passage of the declaratory judgment acts,[10] persons against whom claims of breach of contract were made could not initiate actions to obtain an interpretation of the contract. Although

[10] The Federal Declaratory Judgment Act was passed on June 14, 1934, a week before the Railway Labor Act of 1934. See 48 Stat. 955, 1185.

this may have been inconvenient for them, it was never thought that this disability, which left them with full power to assert their rights defensively in an action brought against them, was unconstitutional. The Railway Labor Act, enacted one week after the Declaratory Judgment Act, was drafted and approved by the congressional committees before the Declaratory Judgment Act became law, and it can hardly be said to have been designed with an eye toward procedural remedies which were non-existent until the latter act was passed.

The petitioner claims that the statutory remedy is inadequate because the employees have usually not brought suit under paragraph (p), but have threatened to strike if the carrier did not comply with the award. This has happened on eight occasions (see p. 34, *supra*). The employees' position is that since the carriers can enforce awards in their own favor without the necessity of going to court, the employees should not be compelled to go to the trouble of suing and engaging in expensive and time-consuming litigation to obtain enforcement of awards when they have been successful before the Board. (*Ibid.*) While it is difficult on this point to judge cases in the abstract, it can be said that the object and hope of the Railway Labor Act was to insure the peaceful settlement of labor disputes, and the reason for giving the employees the remedy contained in paragraph (p)

was to provide a means for enforcement of awards which would make the use of economic pressure unnecessary.

But the fact that such tactics may have been adopted does not, in our view, change the situation so as to give the carrier an additional judicial remedy. Before the Railway Labor Act and the Declaratory Judgment Act were passed, the employees could have enforced their claims under labor agreements either through a lawsuit or by the threat to use economic force. The carriers' only judicial remedy at that time was defensive, a fact which obviously did not deprive them of constitutional rights.

The question then comes down to what Congress intended. The legislative history indicates that Congress did not have in mind the possibility that the enforcement suit under paragraph (p) would not be used by the employees. Since the employment of a threat to strike as a device to enforce Adjustment Board awards was hoped to be avoided, it did not affect the understanding of Congress that the statutory remedies were expected to be adequate to cover all situations and accordingly were exclusive.

We believe it probably true, however, that in establishing an adequate remedy to cover all situations Congress assumed that the remedy would be used. We can do little more than speculate as to whether Congress would have intended the remedy to be exclusive if it had known that the

labor organizations would refuse to avail themselves of it. That would depend in part on whether the object of Congress was to provide an adequate means of judicial review of the Board's orders or an effective and legal method of enforcing them when disobeyed. The legislative history (*infra*, pp. 75–80) shows concern only as to the latter. Accordingly, despite the effect of the employees' unforeseen refusal to avail themselves of the remedy upon its practical adequacy, we do not feel free to urge that, because of the manner in which the Act has operated, it should be construed in a way not intended by the Congress.

Petitioner attacks the adequacy of the statutory remedy on the ground that the Adjustment Board is not a judicial or quasi-judicial body and that its procedure does not conform to the standards generally recognized as essential to due process. It may be conceded that the Board differs in many respects from other administrative agencies or tribunals. See p. 23, *supra*. But as long as the constitutional rights of the carriers are safeguarded, this would appear to be immaterial. The carrier has a legal right to disregard a Board order until it has been affirmed by a court in an action brought under paragraph (p). The carrier will be able to present its side of the case adequately in a defense to such a proceeding. Since an award has no legal effect until judicially approved, the carriers' constitu-

tional rights are protected irrespective of the nature of the Board or its procedure."[71]

For the Act, in making the Board's awards *prima facie* evidence of the facts stated, merely shifts the burden of proof. *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478, 482. Congress has the power to shift the burden, and certainly may do so on the basis of a preliminary determination of facts, regardless of whether such determination was based upon a completely judicial proceeding. *Nickey* v. *Mississippi*, 292 U. S. 393 (tax assessment *prima facie* valid); *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U. S. 440, 451–454 (engineer's report *prima facie* evidence).

From the above analysis we believe that the remedy established by Congress was, and was intended to be, legally adequate to protect both carriers and employees in all situations, once a case had been decided by the Adjustment Board. The fact that such a remedy was established affords support for the belief that Congress intended that

[71] There is no indication in the statute that Congress intended that the Adjustment Board not follow the procedural standards commonly accepted by other judicial agencies (see paragraphs (i), (j), and (m) of Section 3), although the Board does lack the subpoena power granted to most administrative agencies. The Board has generally proceeded, however, on the assumption that its procedure was intended to be the same as that of the adjustment boards established by agreement before 1934. See pp. 23, *et seq.*

remedy to be followed once the statutory machinery was invoked.

b. *The analogy of the Interstate Commerce Act.* This construction of the Act is supported by the practice under Section 16 (2) of the Interstate Commerce Act, which Section 3, First (p) follows almost in *haec verba.* See p. 91, n. 99, *infra.* Both statutes relate to actions against carriers, in the one instance by shippers and in the other by employees. Neither gives the carrier any remedy except by way of defense.

Under Section 16 (2) in many cases shippers have an election whether to proceed before the courts or before the Interstate Commerce Commission. *Baltimore & Ohio R. Co.* v. *Brady,* 288 U. S. 448, see p. 57, *supra.* But after a shipper has taken his case to the Commission, Section 16 (2) has been held to provide the exclusive remedy. *Ibid.* If he loses before the Commission, he is remediless. *Ibid.; Brady* v. *Interstate Commerce Commission,* 43 F. (2) 847 (N. D. W. Va.), affirmed, *sub nom. Brady* v. *United States,* 283 U. S. 804; *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, 394; *Standard Oil Co.* v. *United States,* 283 U. S. 235, as interpreted in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 140n. And the remedy prescribed in that section has been held to bar the carrier from suing to enjoin the enforcement of a reparations order. *Pittsburgh & W. V. Ry. Co.* v. *United States,* 6 F. (2d) 646 (W. D. Pa.); *Balti-*

more & Ohio R. Co. v. *United States,* 87 F. (2d) 605, 606 (C. C. A. 3). Although the latter cases involved suits for injunctions,[72] we think that the same policy applies to actions for declaratory judgments when a special statutory remedy is available.

More significant, perhaps, than these decisions was the general practice and understanding that carriers could not sue to set aside reparations orders. Whether because no such action was available to them or because they were satisfied with the protection afforded them as defendants in proceedings brought under Section 16 (2), they have not instituted many such actions. Whatever the reason, Congress, which modeled paragraph (p) of the Railway Labor Act on Section 16 (2), may not unreasonably be deemed to have intended it to have the same effect as an exclusive remedy once proceedings had been instituted before the administrative body.

c. *The advantages given the employees.* To permit a carrier to bring suit for a declaration as to the meaning of a railway labor contract, after the Adjustment Board has decided the identical case against the carrier, would deprive the employees of some of the advantages which paragraph (p) was designed to give them. Under that paragraph once an employee had convinced the Adjustment Board that his claim should be allowed, he was

[72] The decisions turned in part on considerations applicable only to cases under the Urgent Deficiencies Act.

given the choice of venue, immunity from costs, and the right to attorneys' fees, and in addition the award became *prima facie* evidence of the facts stated. In the absence of express statutory authorization, the first three [13] of these would clearly not be available in a suit brought by the carrier.[14]

It is no answer to impute triviality to these advantages by characterizing them as merely procedural. Congress intended the successful claimant before the Adjustment Board to have them, and they will be unavailable to him if he must defend his award in a suit brought by the carrier. On this point we can add nothing to the ably reasoned opinion of Justice Rutledge in the court below (R. 334–339).

Petitioner argues that the employees may still secure these advantages if they sue within the two-

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[13] A court of equity may allow costs "as between solicitor and client," but only "in exceptional cases." *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 167.

[14] This would probably not be so as to the requirement that the Board's award be *prima facie* evidence. If we assume that Congress did not intend paragraph (p) to provide an exclusive method of review, it would not have intended that a Board award be given less weight in a suit by the carrier than in a suit by an employee. Accordingly any court which was called upon to review the Board's decision, or to pass upon the same dispute after the Board had made its award, would be required to give the award at least the weight prescribed in a proceeding under paragraph (p). This conclusion can rest both upon what Congress would have intended under this particular statute and upon general principles of administrative law. Cf. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177.

year period allowed, and that even if the carrier has previously instituted its own independent suit, the employees would not be foreclosed from bringing a statutory enforcement suit; that if they did so the court in which the first suit was brought would be required to stay its hand until the second case had been terminated. But the result would be that the employees would still, to some extent, have to defend a separate suit brought by the carrier, in which the statutory advantages would not be available to them. Furthermore, it is highly speculative, in view of the vagaries of court calendars and the range of discretion open to federal and state trial court judges, whether once the carrier had brought its suit, the situation would invariably be adjusted so as to protect the employee in the manner suggested."[73]

THE SECOND QUESTION

WHETHER THE BOARD MAY MAKE AN AWARD EX PARTE IF ONE PARTY TO THE DISPUTE DOES NOT APPEAR BEFORE THE BOARD, AND IF SO THE EFFECT GIVEN BY THE STATUTE TO SUCH AN AWARD

The Court has asked our view as to whether the Board may make an award *ex parte* if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award.

Inasmuch as the Act requires the Board to give notice to the parties involved in a dispute (Sec. 3,

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[73] See pp. 28–29, *supra*.

First (j)), there can be no *ex parte* award in the sense that the adverse party is not notified and given an opportunity to be present. Accordingly, we assume that the Court's question relates to a case in which the responding party is notified but does not appear.

We think that if a party does not appear after notice is received, the Board may make an award against him,[16] and that such an award shall have the same effect as if he had appeared.[17] The Act provides that disputes may be referred to the Board "by either party" (paragraph (i)). The Board is to give notice to all parties, and is empowered after hearing to enter its award. There is no restriction upon the effect of these general provisions in case one party does not appear, and we think that no such limitation can possibly be implied.

The statutory provisions do not differ substantially from those relating to other judicial or quasi-judicial agencies, and we think it proper to assume that the Board would have the power, unquestionably possessed by other bodies, to render a decision although one party fails to appear. To hold that the Board's proceedings could be hamstrung or rendered less effective by the failure

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[16] Whether such an award could be entered by default, without any consideration of the merits of the case presented by the petitioning party, would presumably depend upon the rules of the Board.

[17] Since this is so, we do not think the responding party's appearance may properly be regarded as voluntary.

of a party to participate in its proceedings would enable the defending party to nullify the statutory scheme.

THE THIRD QUESTION

THE EFFECT OF THE EXPIRATION OF THE TWO-YEAR PERIOD SPECIFIED BY SECTION 3, FIRST (Q) UPON THE RIGHT OF EITHER PARTY TO THE DISPUTE TO OBTAIN A DETERMINATION OF IT IN THE COURTS

If either party may obtain an independent determination of a dispute in the courts immediately after and not withstanding the Board has entered its award, apart from the procedure prescribed in the Act, he or it can unquestionably still do so after the expiration of the two-year period specified in paragraph (q) for suing on Board awards.[78] The only question which need be considered here is whether the same result follows if it should be held that, if the dispute has gone to the Board, a party may not sue (except in the manner specified in paragraph (p)) during the two-year period.[79] The court below left that question open, treating the case as one begun before the expiration of the two years. The two years ex-

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[78] The paragraph reads as follows: "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

[79] We assume in the following discussion that no other statute of limitations stands as a bar to the suit in a particular case. Such statutes would presumably govern if the limitation in paragraph (q) did not apply.

pired, however, while the case was under consideration by the Court of Appeals.[50]

An employee who has prevailed before the Board can no longer bring the action described in paragraph (p) after two years have elapsed from the time the Board's award became effective (R. 347). We think that Congress would not have intended him to be able to sue on the contract, independently of the award, after that period. This result can be supported on the ground that his original cause of action on the contract was merged in the award. Whatever the theory, we think that a holding that all actions by employees are barred after the two years is most consistent with the policy of limitation contained in paragraph (q).

If, as we are assuming *arguendo,* the carrier has no right to institute a suit during the two-year period, it does not seem reasonable to hold that its cause of action, which vanished when the case was first submitted to the Adjustment Board, revived at the expiration of the two years, the exact moment when the employee's claim became unenforceable in court. It is more reasonable to conclude that the Board's award, and the claim upon which it was based, become dead if not obeyed within two years and if no enforcement suit has been brought within that time. The carrier would then

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[50] The Adjustment Board's award was made October 24, 1938 (R. 4). The case was argued before the Court of Appeals on April 18, 1940 (R. 330). The case was decided by the Court of Appeals on November 18, 1941 (R. 331).

be under no legal obligation to comply with the award, and there would be no substantial basis for allowing it to maintain an action involving the question raised. Indeed, after the employee had lost his right to enforce his claim, there might no longer be even a case or controversy in the constitutional sense; there would merely be a difference of opinion between the parties as to how the contract should be interpreted.[81]

For these reasons we are of the opinion that if the submission of a case to the Adjustment Board should be held to deprive a carrier of the right to bring a separate judicial proceeding, the disability should not be limited to the two-year period, but should be regarded as permanent.

THE FOURTH QUESTION

THE EFFECT OF THE WORDS "FINAL AND BINDING" IN SECTION 3, FIRST (M) UPON THE RIGHT TO RESORT TO THE COURTS AND UPON THE SCOPE OF JUDICIAL REVIEW, (A) DURING THE TWO-YEAR PERIOD, AND (B) AFTER EXPIRATION OF THE TWO-YEAR PERIOD[82]

Section 3, First (m) of the Railway Labor Act states that the awards of the Adjustment Board

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[81] To the extent that new claims could arise based upon a continuation of the same conduct, the question would not be academic. New proceedings could presumably be based upon acts occurring after, or differing from, those which were the basis of the claim before the Adjustment Board.

[82] For reasons set forth in answer to the third question (*supra*, pp. 67–69), we think the right to resort to the courts outside of paragraph (p) and the scope of judicial review do not change at the expiration of the two-year

shall be "final and binding upon both parties to the dispute, except in so far as they shall contain a money award." Paragraph (p), which is not limited to money awards,[82] specifies the only statutory means of enforcing such awards, and declares that in such cases the order of the Board shall be "prima facie evidence" of the facts stated. These two paragraphs contain apparently inconsistent provisions as to the manner in which the Board's awards shall be treated. The language of paragraph (p) makes it clear that the *prima facie* evidence rule governs suits brought to enforce awards. The question is what effect, if any, can be given to the clause in paragraph (m). To the extent that the clause makes an award conclusive, it strengthens the position taken in answer to the court's First Question that no extra-statutory method of reviewing the Board's orders is available.

A. LEGISLATIVE HISTORY

Since the language of the Act is itself responsible for doubt as to what was meant, we turn to other indicia of legislative intention. Neither the committee reports nor the congressional debates, however, deal with this issue. Some idea as to what

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period. Accordingly, the views set forth in this section are equally applicable to the period before and after the expiration of two years from the Board's award.

[82] In this respect paragraph (p) differs from Section 16 (2) of the Interstate Commerce Act, which applies only to orders "for the payment of money." See p. 91, *infra*.

Congress intended may be gleaned from an examination of the historical background of paragraph (m), and also from the references to it in the legislative hearings on the 1934 Act.

1. *Historical background.*—The words "final and binding" in paragraph (m) were taken from Section 3 of the 1926 Railway Labor Act.[54] That section (44 Stat. 577, 579) provided that boards of adjustment should be created by agreement of the parties, and that the agreement should, *inter alia,* contain a stipulation that "decisions of adjustment boards shall be *final and binding* on both parties to the dispute; and it shall be the duty of both to abide by such decisions * * *". (Section 3 (e)). (Italics supplied). The quoted passage would seem in turn to have been taken from the agreements between the carriers and train service employees for the Southeastern, Eastern and Western Regions, adopted in 1921, establishing regional adjustment boards.[55] The thirteenth paragraph of each of these agreements provided that:

> 13. All decisions of the Board shall be approved by a majority vote of the full membership of the Board, and shall be *final and binding* upon the parties to the dispute. [Italics supplied.]

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[54] Mr. Eastman so testified before the House Committee. House Hearings, p. 58.

[55] These agreements are quoted in the Appendix to the Compilation, pages 39, 43, and 50.

Similar language has been included in the arbitration provisions of railway labor legislation for a number of years. Section 8 (*l*) of the 1926 Act (44 Stat. 577, 585, 45 U. S. C. § 158(1)), which remained unchanged in 1934, declared that agreements to arbitrate

> Shall provide that the award, when so filed [in a United States District Court], shall be *final and conclusive* upon the parties as to the facts determined by said award and as to the merits of the controversy decided; [Italics supplied.]

Title 3 of the Transportation Act of 1920 (c. 91, 41 Stat. 469) contained no arbitration section. Its predecessor, the Newlands Act of July 15, 1913 (38 Stat. 103, 105) provided, however, for the settlement of controversies by agreements to arbitrate. Section 4 of that Act stated that "the agreement to arbitrate—

* * * * *

> Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arises or the arbitration is entered into, and *shall be final and conclusive* upon the parties to the agreement unless set aside for error of law apparent on the record; [Italics supplied.]

A substantially identical paragraph was contained in Section 3, Second, of the Erdman Act of June 1, 1898 (30 Stat. 424, 425).[56]

All of these provisions, the language of which is similar to that contained in paragraph (m) of the present Act, differ from it in one fundamental respect. In every case the tribunal which was to render "final and binding," or "final and conclusive," awards was to be established by the agreement of the parties. The statutes merely declared that such agreements, if made, should contain such clauses. But the finality of the awards was ultimately dependent upon the consent of the parties, not upon a statutory mandate. Questions as to the effect of the awards would thus be determined in accordance with the principles of the law of contracts or of voluntary arbitration.

It is, of course, to be noted that the "final and binding" clause does not apply to money awards, which constitute much the largest proportion of the decisions rendered by the Adjustment Board.[57]

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[56] These provisions were applied in *Georgia & F. Ry. Co.* v. *Brotherhood of Locomotive Engineers*, 217 Fed. 755 (C. C. A. 5), and *In re Southern Pacific Co.*, 155 Fed. 1001 (C. C. N. D. Cal.). In these cases the court's power to overturn awards was regarded as the same as in common law arbitration.

[57] The Secretary of the First Division has advised the Solicitor General that the 789 sustained awards rendered by that Division during the year 1942 fell in the following classes: (1) money awards 517; (2) mixed awards 221; (3) non-money awards 51.

Money awards were presumably treated differently because of a belief that the Constitution required a trial by jury to be available in such cases.

2. *The legislative hearings.* The legislative hearings show that the draftsmen of the 1934 Act unquestionably obtained the "final and binding" clause in paragraph (m) from the provisions in the earlier statutes for the inclusion of such a requirement in adjustment and arbitration agreements. Mr. Eastman stated, in reference to paragraph (m) (House Hearings, p. 58):

> That is the same language which, as I recall it, is in the present act with reference to decisions of boards of adjustment on grievances. The present act also provides that if the parties agree to arbitration of a major issue, then the decision of the board of arbitration shall be final and conclusive.
>
> Now, the only difference here is that there is provision for preventing deadlocks on an adjustment board by the appointment of a neutral member.

In answer to questions as to the right of employees to strike if an award went against them, Mr. Eastman declared (*id.*, p. 59):[88]

> In my answer to you I said there was nothing in the act which provided for the

[88] The question as to the right to enjoin a strike by employees was seemingly left up in the air. Mr. Eastman's legal adviser, Mr. Carmalt, thought it arguable that such a

enforcement of those particular decisions. That answer would not apply to decisions of the adjustment board, and they are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties representing both sides on the adjustment board, a neutral man steps in and renders the decision, and they will be required to accept that decision when made, with respect to these minor matters. * * *

The colloquy on this subject continued (House Hearings, pp. 60–61):

Mr. COOPER. Do I understand this paragraph then on page 17, in which it says, "the awards shall be final and binding upon both parties to disputes", would that pre-

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strike might be enjoined under the law (House Hearings, pp. 62–63). Mr. Eastman thought the contingency would not arise, since he could not "conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices." His idea was to find out from experience whether such a provision was necessary before including it in the law (pp. 62–64). Congressman Wolverton stated, however, that although that might be true, he was seeking to find out "whether this language declares something else to be the policy" (p. 64). Mr. Eastman then agreed to study the matter and give the Committee his opinion on it, but so far as we know, nothing further was done.

vent a railroad employee or an organization from striking, if they saw fit? Would it be a violation of the law if they did that?

Mr. PETTENGILL. Could an injunction issue to prevent them from doing it?

Commissioner EASTMAN. I cannot tell you what the legal procedures would be in enforcing the award, where it is against the employee. Paragraph (p) covers the case where a carrier does not comply with the order of the adjustment board.

Mr. COOPER. Would it apply to either carrier and/or employees? Now, if we go that far are we not writing something new into the law of the land to deprive the employees of rights which they already had?

Commissioner EASTMAN. Well, as I say, you have exactly similar provisions in the present labor act with respect to decisions by adjustment boards and where they agree to arbitration, and this law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.

The CHAIRMAN. Was that not one of the reasons, to try to keep down strikes to get people together?

Commissioner EASTMAN. Yes. It is a very important part of it. The willingness of the employees to agree to a provision of that sort seemed to me to be a very important and praiseworthy thing.

Mr. COOPER. Well, I fully approve of that method, Mr. Commissioner, and I say that if they are going into these boards and are

willing to go in there, why probably they ought to abide by the finding of the board; but I do not know whether I would want to go so far as to say that if they do not agree to it that it would be a violation of law.

Mr. WOLVERTON. Does this act in any way, Mr. Eastman, provide that it will be a violation of law if they do not comply with the decree and the order that is made?

Commissioner EASTMAN. It says that the award shall be final and binding.

Mr. WOLVERTON. Does this bill attempt in any way to enforce that provision; and if so, is it contrary to public policy to put such a provision in the bill?

Commissioner EASTMAN. Page 19, line 19 [the last sentence of paragraph (p)], it says:

The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the adjustment board.

Chairman Winslow of the former Board of Mediation, subsequently stated with reference to the "final and binding" clause (House Hearings, p. 72):

* * * The bill requires "final and binding" may apply to all decisions of an adjustment board, and that seems easy, but it is not. In the early days of our work, with

> all good intent, we thought that if disputes went through an adjustment board and were decided, that was the end of it for us, and for everybody else, by law. * * *

His experience proved, however, that though the parties agreed that the decisions were "final and binding," they disagreed as to how they should be applied, and that in such cases mediation became necessary. Thus, "in spite of the provision 'final and binding' there is considerable trouble arising" (p. 73).

George M. Harrison, testifying on behalf of the Railway Labor Executives Association, stated his views on the subject as follows (House Hearings, p. 82):

> When that decision is made, the law will provide that it shall be final and binding on the parties and enforceable in the courts, in substantially the same manner as the present law provides for the enforcement of arbitration awards, the extent that the court may go in issuing a mandatory process to compel observance of the decision on the grievance basis.

He then described the situation under the provisions of the 1926 Act as follows (House Hearings, pp. 88–89):

> * * * Now, under the present law we have agreements, set up local machinery, which may be considered comparable to what this will provide, to be established if they want to establish it; but in the

> agreements establishing the voluntary machinery, there shall be a provision to make final and binding and conclusive on the parties the decisions made by such machinery and the parties shall in good faith abide by such decisions. I know—my opinion is, regardless of a specific provision in the law, that if you had a contract made by true and legal representatives set up by such voluntary machinery, you could go into court and enforce the terms of that contract. I am not an attorney, but I base that on experience that we have had, because some of these local boards have made decisions and managements have refused to respect them, and when court action was threatened, we generally got the terms of the contract obeyed.

Before the Senate Committee, Mr. Harrison had stated (Senate Hearings, p. 32):

> Then we provided, in order to overcome our past experience, that the decision when made by the adjustment board shall be enforceable. We have had several instances where, even though the law provides that the agreement setting up the board shall provide for the acceptance of the decision by the parties, that the decisions haven't been obeyed.
>
> [p. 34.] The CHAIRMAN. Are the decisions enforceable in the courts just the same as the national-board decisions?
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> Mr. HARRISON. We don't provide for that, but it is our intention and our pur-

> pose that such system boards, group boards, or regional boards that are established by the parties, by agreement, will provide such terms that the decisions can be enforced in the courts. The fact of the matter is the present law provides for that. It provides that decisions shall be final and binding and conclusive on the parties, and I think that kind of decisions can be enforced.

He emphasized the fact that under an agreement to settle disputes, the award would voluntarily be lived up to by the labor organizations (House Hearings, p. 89).

These statements of opinion before the congressional committees show that the witnesses expected the awards of the Adjustment Board to have the same effect as those of the earlier adjustment and arbitration boards, and that such awards have usually been obeyed voluntarily. They also indicate that a method of enforcement against the carrier was considered desirable in case of failure to comply, but was not thought necessary against the employees since the carrier could itself put the award into effect. See pp. 55–56, *supra*.

Paragraph (p), which contains the enforcement device adopted, was regarded as strengthening the award rather than the contrary. No one referred to the *prima facie* evidence provision in that paragraph, or conceived of the possibility of conflict between that provision and the "final and binding" clause in paragraph (m). Nor did anyone advert

to the fact that most of the Board's decisions would be money awards to which the Act did not give final and binding effect.

B. THE MEANING TO BE GIVEN THE "FINAL AND BINDING" CLAUSE

It is apparent from the above that neither Congress nor the persons who explained the Act to its committees were conscious of the possible inconsistency between the "final and binding" clause in paragraph (m), derived from earlier adjustment and arbitration statutes, and the *prima facie* evidence rule in paragraph (p) taken from the Interstate Commerce Act. In the absence of any actual legislative intention as to how the provisions were to be reconciled, we must, in accordance with familiar rules of statutory construction, search for an interpretation of the law which will give each paragraph meaning and leave Section 3, as a whole, harmonious and consistent.

Conceivably the "final and binding" clause might be interpreted as (1) foreclosing all review of non-money awards, except as provided in paragraph (p) or required by the Constitution; (2) giving such awards the same effect as an arbitration award, to the extent legally permissible; (3) expressing a desire that the parties abide by the awards, but with paragraph (p) controlling as to the scope of review and the procedure to be followed; or (4) making non-money awards subject only to the final and binding clause and money

awards alone subject to the *prima facie* evidence rule contained in paragraph (p).

1. The "final and binding" clause in paragraph (m) might be deemed to require that an award (except for a money award) be treated as conclusive, except as otherwise specifically indicated in the Act or as limited by constitutional considerations. This view would appear to be most consistent with the strong language used. The clause would not be conclusive, of course, in an enforcement suit brought by an employee under paragraph (p), since in that case the Act specifically requires that it be treated only as *prima facie* evidence.

But the "final and binding" clause might be held to bar all other methods of attacking non-money awards, to the extent legally permissible. This would mean that neither the employees nor the carriers could seek review of awards in cases decided against them or otherwise collaterally impeach an award. This result would be constitutional as to the carrier if the Court regards the right of the carrier to defend its position in an enforcement action under paragraph (p) as a legally adequate remedy (see pp. 57–62, *supra*). It would be valid as to the employee if the decision in the *Moore* case is not restricted or overruled, and if he has an election between suing in court or proceeding before the Board. He cannot complain of the inadequacy of a remedy he has voluntarily chosen. And even if he has no such choice it

would probably be valid as to an employee who has invoked the Board's services. The position of such an employee is analogous to that of a shipper who can place his claim for reparations only before the Interstate Commerce Commission. If such a shipper takes his case to the Commission and is denied relief, he has no available avenue of judicial review.[89] This result has been based in part on the discredited "negative order" doctrine, and in part on the "statutory scheme dealing with reparations."[90] Whatever the theory, it has never been thought to deprive the shipper of constitutional rights.[91]

If a proceeding were brought *against* an employee,[92] these principles might not apply. Such an employee would not have invoked the Board's services. Nor would he be able to avoid compli-

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[89] See pp. 62–63, *supra*.

[90] *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 140n.

[91] If the right of shippers to judicial review had rested on the Constitution, the negative order cases would have been in violation of the Constitution. This was not suggested in the *Rochester Telephone* case.

[92] Although it is rarely, if ever, done, the carriers have equal power with the employees to bring cases before the Board. Sec. 3, First (i). An employee might also be before the Board as a third party respondent in cases brought by other employees against a carrier. E. g., *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673. Seniority disputes often find employees, or groups of employees, on the side of the carrier. *Ibid; Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5); *Stephenson* v. *New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937).

ance with the Board's order until an enforcement suit was instituted against him and thus assert his position defensively; the carrier might make the award effective immediately.

Wherever the remedy was legally inadequate, a person would presumably be entitled to bring an appropriate independent action attacking the award of the Board. Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. In such an action, the Board's award would be "final and binding" to the extent that Congress could make it so. In other words, the scope of judicial review would be the minimum required by the Constitution. Although it is unnecessary to determine in this case just what those limits are, we assume that the court would at least have power to determine questions of law, such as whether there had been compliance with the statute and the Constitution.[93]

2. Since the "final and binding" clause was derived from earlier statutes requiring the inclusion within adjustment and arbitration agreements of a similar provision, it can be argued that it was intended to give non-money awards of the adjustment boards the same effect as those of its predecessors. The testimony of Mr. Eastman and Mr. Harrison quoted *supra,* pp. 74–80 supports this conclusion.

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[93] As to whether the question of the existence of substantial evidence to support a finding raises a question of law see *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, Nos. 387–388, decided February 8, 1943.

There has been no judicial pronouncement as to the effect of the awards of the early adjustment boards; but the agreements establishing the boards closely resemble contracts to arbitrate and we assume that the principles governing the enforcement of arbitration awards would be applicable. Such awards normally would be enforced by the courts in the absence of "irregularity, fraud, *ultra vires* or other defect," *Marine Transit Co.* v. *Dreyfus,* 284 U. S. 263, 276; *Burchell* v. *Marsh,* 17 How. 344, 349;[*] *York & Cumberland R. R. Co.* v. *Myers,* 18 How. 246, 253. The Railway Labor Act specifies, in Section 9, that an arbitration award may be impeached only if it does not conform to the requirements of the Act, is not confined to the stipulations of the agreement to arbitrate, or is fraudulent or corrupt. The United States Arbitration Act of February 12, 1925 (43 Stat. 883, 885, 9 U. S. C. Sec. 10), the Uniform Arbitration Act (9 Uniform Laws Annotated, p. 61) and the Draft State Arbitration Act (e. g., N. Y. Civ. Practice Act, Sec. 1457) all provide that an award may be vacated if fraudulent or corrupt, if the arbitrators have been guilty of misconduct (such as refusing to hear material evidence) or prejudicial misbe-

[*] In the *Burchell* case the Court stated "If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."

havior, or if the arbitrators have "exceeded their powers."[95]

These reasons for setting aside an arbitration award are not strictly applicable to administrative determinations. They demonstrate, however, an intention that the power of the courts to overturn awards be circumscribed within extremely narrow limits. When translated into terms of administrative law, they would probably permit the courts only to overturn an award if it was not issued in conformity to the statute or was otherwise illegal (see pp. 84–85, *supra*).[96] These have been the grounds upon which awards of the present Adjustment Board have been invalidated. (See pp. 34–35, *supra*.)

In the law of private arbitration, since the entire proceeding was based upon contract, the usual contractual remedies were available unless the agreement specified otherwise.[97] This would customarily mean that the person who broke the contract could be sued for damages or to prevent further breach. Until the declaratory judgment came into existence, he would have been able to bring no action of his own.

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[95] The citations to the various state arbitration laws are collected in Sturges, *Commercial Arbitrations and Awards* (1930), p. ix and appendix.

[96] We assume that an administrative order, like that of an arbitration board, could also be set aside for fraud, but know of no cases in which that problem has arisen.

[97] It is unnecessary here to consider the extent to which the courts at common law refused to enforce contracts to arbitrate.

The tendency of modern arbitration statutes, such as the United States Arbitration Act and the Railway Labor Act itself, is to permit an award to be attacked only in a prescribed manner. Under the Railway Labor Act, an arbitration award may be challenged on the specified grounds only within ten days after it has been filed with the clerk of a federal district court (Section 9).[20]

We think this expression of legislative policy as to arbitrations generally may well be given effect in construing the provision of paragraph (m), which has its source in statutory provisions for arbitration. If the arbitration analogy is applied, a non-money award could be contested only in the manner prescribed in the Act. This would lead to the conclusion that the means of setting aside awards prescribed in paragraph (p), if legally adequate, would be exclusive.

The consequence of giving to the final and binding clause the effect given to its predecessors would thus mean that both the method and the scope of review would be narrowly restricted. Such an interpretation would lead, in its practical operation, to the same result as that previously suggested, that the award be deemed final except where the statute specifies to the contrary or where necessary to fulfill constitutional requirements.

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[20] Cf. United States Arbitration Act, Section 10; Uniform Arbitration Act, Secs. 15–18 (9 U. L. A. 66–67); N. Y. Civ. Practice Act, §§ 1456–1458; Sturges, loc. cit. *supra*, c. 15.

3. The effect of the "final and binding" clause in paragraph (m) may be regarded as having been generally curtailed by the *prima facie* evidence provision in paragraph (p). It can be argued that the latter paragraph, which gives the Board's order relatively little weight, shows that paragraph (m) was not intended to determine the scope of judicial review or affect the right to resort to the courts. This view finds support in the apparent unreasonableness of treating the award as conclusive when it has *prima facie* effect in the only kind of proceeding in which it can be enforced, as well as the fact that the clause is in terms inapplicable to the larger proportion of money awards entered by the Board. This anomaly can be avoided by applying the specific indication in paragraph (p) as to the desired scope of review to any judicial proceeding involving Board orders.

On this theory, the "final and binding" clause has the effect merely of a legislative declaration that the parties ought, and were expected, to abide by Board orders. The force of the mandatory character of the language used is destroyed by the fact that the only means of enforcement against a carrier is through a suit in which the award is given only *prima facie* weight.

That the "final and binding" clause was largely precatory in and of itself appears from the fact that Mr. Eastman and Mr. Harrison regarded it as strengthened by paragraph (p). Mr. Harrison indicated that similar language in the earlier ad-

justment agreements was valuable in the main as an expression of the good faith of the parties establishing the Board and as manifesting their willingness to abide by an award voluntarily. If a carrier refused to comply, the threat of court action was necessary. Paragraph (p) was designed to provide a similar sanction for the awards of the new Board.

If the "final and binding" clause is given this effect, it would not control the scope of judicial review, nor would it limit the ways in which orders of the Board could be judicially attacked. Paragraph (p) would govern on both of these issues. The scope of review generally, as to both money and non-money awards, would be that specified in the later paragraph; the award would be given *prima facie* effect only. If the Court should, for reasons unconnected with the "final and binding" clause, hold paragraph (p) to be an exclusive remedy, all other avenues of review would be closed. If the Court should hold to the contrary, Board orders would be subject to review in other proceedings, in all of which they would be given *prima facie* weight.

4. Since the "final and binding" clause does not apply to money awards, it may be suggested that it can be reconciled with paragraph (p) by giving non-money awards final and binding effect (to the extent constitutionally permissible) but leaving money awards alone to be controlled by the procedure prescribed in the latter paragraph. We do not think that the Act can be so construed.

It is true that the exemption of money awards from the "final and binding" clause, and the *prima facie* evidence rule in paragraph (p) both had their roots in the right to a jury trial in suits for money damages. Paragraph (p) was derived from Section 16 (2) of the Interstate Commerce Act, which only applied to orders for the payment of money, and which this Court has indicated was drafted in the light of the constitutional right to a jury trial. *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 458. But the fact that paragraph (p) was obviously modeled on Section 16 (2)" emphasizes the importance of the few

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" Section 16 (2) of the Interstate Commerce Act (before immaterial changes in 1940 (54 Stat. 912)) reads as follows:

If a carrier does not comply with an order *for the payment of money* within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of

Section 3, First (p), of the Railway Labor Act reads as follows:

If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates,

differences between the sections. Whereas Section 16 (2) is limited to an order "for the payment of

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general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims *damages*, and the order of the commission in the premises.

Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for *damages*, except that on the trial of such suit the findings and order of the commission

shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

a petition setting forth briefly the causes for which he claims *relief*, and the order of the division of the Adjustment Board in the premises.

Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board

shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States.

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

money," and refers to actions for "damages" only, those phrases were omitted from paragraph (p) of the Railway Labor Act. And Congress added to the latter paragraph a sentence not contained in Section 16 (2), providing that:

> The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

Such other forms of relief as are contemplated in this provision for judgment of "mandamus or otherwise" are clearly broad enough to encompass non-money awards, and it would have been unnecessary to provide for them if only money awards were intended to be reached. This sentence was referred to in the hearings (see pp. 77–78 *supra*) as bolstering the final and binding clause. It was undoubtedly included in the Act in order to make it clear that both money and non-money awards could be enforced against the carriers.

Both paragraph (p) and the final and binding clause in paragraph (m) thus apply to non-money awards. We are accordingly compelled to conclude that no differentiation between the two paragraphs on the basis of a distinction between money and non-money awards would be warranted.

Recommendation.—We have suggested that the "final and binding" clause might, with some justification, be construed as:

1. Foreclosing all review of non-money awards, except as provided in paragraph (p) or required by the Constitution;

2. Giving an adjustment board award the same effect as an arbitration award, to the extent legally permissible; and

3. Expressing a desire that the parties abide by the award, but with paragraph (p) controlling as to the scope of review and the procedure to be followed.

The first of these interpretations is probably supported most closely by the ordinary meaning of the words employed; the second by the historical background of the clause, and partly by the statements of the persons testifying before the Congressional Committees; and the third by the practical effect of the broad scope of review allowed in the only proceeding in which the awards can be legally enforced, and the fact that the large proportion of money awards are not governed by the clause at all. The first two of the interpretations reach substantially the same results, as does the third if paragraph (p) be regarded as an exclusive remedy apart from paragraph (m). On any of these theories, if our views as to the adequacy of the remedy are correct, the Board's awards can normally be challenged only by way of defense to a suit brought under paragraph (p); in such a suit,

of course, the awards would have only *prima facie* weight.[100]

We believe that Congress intended the Board's awards to be accepted by the parties at least to the same extent as had been the decisions of its predecessors. No one thought that the statutory mandate would be less potent than a contractual provision to the same effect. Indeed, the enforcement procedure in paragraph (p) was regarded as strengthening the award. The failure of any one to refer to the *prima facie* evidence provision in that paragraph is an indication that no one was of the opinion that it would completely alter the effect of the awards. For this reason, we believe that the Board's awards should be made as "final" as possible, in accordance with either of the first two of the interpretations discussed above.

This view, we think, is also most consistent with the over-all purpose of the Act to insure the peaceful settlement of labor disputes. The friction arising from the many disputes as to grievances and the interpretation of contracts will be reduced to the extent that the parties treat the awards of the Board as "final and binding."

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[100] If paragraph (p) is held to be an exclusive remedy apart from the "final and binding" clause, money and non-money awards would be subject to the same treatment. If not, extra-statutory suits on money claims alone might be permissible. It is of some significance that, outside of the language of paragraph (m) itself, there is no indication in the legislative history or purposes of the Act that money and non-money awards were to be governed by different rules.

THE BASIC ISSUE UNDERLYING THIS CASE

The importance of this case transcends that of the rather technical legal issues to be decided. It involves fundamental differences between management and labor as to the effect to be given the adjustment provisions of the Railway Labor Act.

Labor favors the final and complete settlement of cases by the adjustment device and is willing, without other compulsion, to abide by awards of the Adjustment Board. When the Act was passed, the employees' representatives recognized that they were agreeing to abandon their right to strike over such questions. In return, labor expected the carriers voluntarily to comply with the Board's decisions.

Although the carriers might have been of the same view when the Act was passed, they have since taken the position that the Board's procedure deprives them of a fair hearing, that this affects the quality of the awards, and that many of the Board's decisions are plainly erroneous and seriously prejudicial to the efficient operation of the roads. As a result, they are frequently unwilling to comply with the awards unless forced to do so, or until they have had an opportunity to have the validity of the awards tested before a judicial tribunal.

The employees reply that the adjustment system will not be workable if the Board's awards are not treated as final without the necessity for litigation to enforce them. The employees' rep-

resentatives feel that, for financial and other reasons, they are in no position to compete with the carriers if such matters are taken to the courts, and that resort to litigation would delay final decisions for a long time after the entry of the Board's awards and thus cause even greater dissatisfaction than now prevails with the period between submissions and settlement. As a result, it was the policy of labor, before the beginning of the present war, not to sue on awards but to threaten to strike if awards were not obeyed. This policy generally resulted in compliance with the awards.

If the carriers prevail in this case, they will have found a means of bringing the Board's awards to the courts, and presumably will take to court all awards against them which they deem harmful. Irrespective of the merits of the decisions in such circumstances, it is clear that the result would be to open an avenue of review not contemplated by Congress and to lessen the effect of the Board's orders. If the employees prevail, on the other hand, they will continue to rely on their economic power instead of upon the judicial remedy provided in paragraph (p), and that paragraph will remain substantially a dead letter.

These difficulties arise because of the substitution of an adjustment system having its foundation in a mandatory statute for a procedure based upon agreements between the parties. When the parties

established the early adjustment boards by agreement, they generally felt bound as a matter of mutual good faith to accept the Board's decisions. The employees believe that the awards of the present Board should be treated with the same respect, particularly since they are final as to the employees if they lose. The carriers, however, see no reason why, since they have not given their word to accept the Board's decisions, the awards should be any more binding than those of other agencies whose decisions are given effect by law. The decisions of other agencies may not be finally accepted until upheld in the courts, and the carriers feel that they need not accept Adjustment Board awards which they deem clearly erroneous unless and until the employees make use of the statutory enforcement procedure which permits the orders to be judicially reviewed.

We have taken the position that paragraph (p) was designed to be an exclusive remedy once the Board has entered an award. We recognize, however, that, although this conclusion may be correct as a matter of statutory interpretation, it is not entirely realistic to bar all other means of review because of the adequacy of a remedy which those to whom it is given deliberately refuse to employ. Although one or the other result will follow, depending on how this case is decided, one cannot view with equanimity either a situation in which all awards of the Board, substantially insulated

against judicial review, are subject to enforcement by threats to strike, or one in which the carriers can use the declaratory judgment procedure to get at the Board's awards and thereby prevent the statute from operating in the manner originally intended.

Our view that the Act should be construed so as to make paragraph (p) an exclusive remedy is based largely on the theory that the carriers' right to defend an enforcement suit brought under that paragraph gave them adequate protection. This contemplates, of course, that paragraph (p) will be of more than academic effect, that carriers may refuse to comply with awards, and that the courts may determine the validity of the awards when suit is brought to enforce them. We think that Congress assumed that the carriers would comply with most of the awards without the need for litigation (as has been the case), but that when the carriers thought an award clearly unlawful they could properly await an enforcement suit against them. The failure of the Act to operate in the manner contemplated, however, would not seem to warrant a further, even though perhaps compensating, judicial departure from the statutory design.

Respectfully submitted.

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